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Analysis of the prospects for updating the trade pillar of the European Union-Chile Association Agreement

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
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STUDY

Analysis of the prospects for updating the trade pillar of the European Union-Chile Association Agreement[1]

ABSTRACT

The perception of the present state of trade relations with Chile is obscured by a lack of adequate understanding of its legal framework as well as of the policy behind it. This study attempts to clarify the present state of and future prospects for trade between the EU and Chile through an examination of previous agreements and the EU's new approach to trade liberalisation. The authors agree with the large consensus existing on both the EU and Chilean sides regarding the efficacy of the Association Agreement, but note that any extension of an agreement with Chile should capture the spirit of older EU agreements rather than simply following the 'NAFTA route'. The study also includes a comparative analysis between the EU-Chile agreement and current trade agreements being negotiated by the EU and Chile with third countries.

[1] This study was commissioned to both authors together with a second study concerning the agreement with Mexico, which was submitted earlier. There will be abundant cross-references between the studies, though each study will be able to be read separately. The text in Section 5.1 has been taken from the study on Mexico for reasons that will be justified in its introduction. Rodrigo Polanco is the main author for this study, and any questions on it should be addressed to him. Ramon Torrent is the main author for the study on Mexico.

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Preface

The length and structure of this study have been established by the Terms of Reference (ToR) given to the authors. As no new deep and comprehensive research could be conducted within its framework, and most of the available data and analyses have already been the subject of evaluation and impact studies commissioned or produced by the by the European Commission[2] and Chile[3], and are at the disposal of the European Parliament (EP), this study emphasises its policy orientation, attempting to define and discuss the main issues that must be tackled in the EP before the launching of and during negotiations. This study discusses some broad considerations on European Union (EU) trade policy that, while not normally analysed in academic literature (and even less in consultancy reports), are extremely relevant for the upcoming negotiation with Chile, and should be taken into account by the EP.

As established in the ToR, this study considers the results of a series of interviews (more than twenty) conducted with relevant actors in the EU and Chile (officials in governments and EU institutions, representatives of business and civil society, academics, and researchers). The interviews were conducted on a confidential basis and no list of interviewed persons can be published.

[2] See i) Copenhagen Economics, 'Ex Post Assessments of Six EU Free Trade Agreements' (February 2011) <http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147905.pdf> accessed 3 February 2016 and ii) ITAQA, 'Evaluation of the Economic Impact of the Trade Pillar of the EU-Chile Association Agreement' (23 March 2012) <http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc_149881.pdf> accessed 12 February 2016.

[3] Directorate General of International Economic Affairs (DIRECON), 'Evaluación de Las Relaciones Comerciales Entre Chile Y Unión Europea a Diez Años de La Entrada En Vigencia Del Acuerdo de Asociación' (June 2013) <http://www.sice.oas.org/TPD/CHL_EU/Studies/Evaluacion2013_s.pdf> accessed 12 February 2016.

Executive Summary

The present study aims to describe the historical context and current status of the trade pillar of the EU-Chile Association Agreement (AA). In particular, this study assesses the real needs and expectations of an eventual update of the AA, in relation to the new context provided by the new generation of free trade agreements (FTAs) negotiated by both the EU and Chile, and to other relevant FTAs or ongoing negotiations. It is important to note that the EU's negotiating strategy with Chile was initially modelled on the one followed with MERCOSUR, but the negotiations evolved as something distinctive and unique, becoming the first EU 'fourth generation' agreement. In this sense, the incorporation of the trade pillar, but also political dialogue and a broad scope of cooperation, presaged the rise of new generation FTAs and thus provides several clues as to where this generation will take trade performance.

Examining the effects of trade and other metrics under the AA, the study concludes that the EU-Chile AA has worked well and not given rise to any specific problems. Therefore, there is no pressing 'need' to modify the agreement in the sense of 'fixing something that doesn't work'. However, after comparing the EU-Chile AA with recent EU trade agreements, the study finds that the current treaty could be improved in several areas due to the evolution of trade disciplines and the need to adapt its text to current developments and market needs, as in the case of sustainable development, government procurement, implementation of wine GIs and the recognition of oenological practices. Other areas of the AA could also be improved, mainly because at the time of its conclusion, the EC did not have competence on the issues or the specific discipline was still nascent. This can be seen in the case of regulatory cooperation and of investment protection, including the EU proposal of an investment court system. Concerning the trade aspects of an updated AA, the authors anticipate very specific demands from Chile concerning fisheries and a desire for revision of EU rules of origin, allowing for accumulation of origin. Specific demands on various aspects of services and investment in the services sector may also be raised (but which may be countered by opposite demands from the EU).

Regarding the model that could serve as a reference for the update of the AA, the European Commission has explicitly stated that the modernisation of the treaty with Chile should be compatible and comparable to CETA and TTIP. Although there are several reasons that could lead the EU to consider this approach, particularly new developments in trade disciplines, the authors believe that the EU should also consider the positive aspects of the current AA with Chile before abandoning the existing framework between both countries. On the other hand, the EU should note that Chile will also bring into play the extensive experience that it has in the negotiation of trade agreements, beyond merely following EU templates.

On both sides, in general, the expectations favour a very ambitious agreement, and possible drawbacks are limited, with no serious identifiable political obstacles at this stage. Issues that are currently highly contentious in the EU, such as investor-state dispute settlement, are a non-issue for Chile, although the EU must convince Chile (and its own Member States) that introducing a new chapter on investment, which modifies the BIT approach, is logical in the context of the new EU-Chile negotiations.

If the upgrade of the EU-Chile AA includes a reinforcement of international regulatory cooperation, the promotion of a new approach on investment protection including and investment court system, and the inclusion of sustainable development provisions into trade agreements in order to promote social and environmental pillars, the new modernised agreement will fit in the new EU 'trade for all' strategy of October 2015.

Introduction

It would seem that the signature of bilateral trade agreements should be explained in terms of trade policy and by reference to the offensive and defensive trade interests of the signatories. However, this seemingly sound approach fails to take into account that, very often, bilateral trade negotiations and agreements are mainly 'politics by proxy', i.e. instruments that serve foreign policy objectives much broader than (and even alien to) trade policy.

This has always been the case for the United States, which has consistently used bilateral trade agreements to 'reward' countries that align themselves with their broader foreign policy.[4]

This has also been the case for the European Community (EC),[5] whose trade policy is defined and implemented, furthermore, in a context and with a political perspective far different from those of the third countries with which it negotiates international agreements. As this issue has already been discussed by the authors in the parallel study on the modernisation of the EU-Mexico Global Agreement, only a brief outline of the arguments will be offered in this introduction. In third countries, trade policy is no more than **one** element of the very complex set of policies that are defined and implemented by their governments and parliaments. This has never been the case for the EC, and is not and cannot be the case for the EU, which remains a political entity with only limited (and in many aspects, very limited) powers, based on the principle of 'attribution/conferral of competences', and whose **main uncontested exclusive competence** has always been, precisely, trade policy. This characteristic has strengthened the tendency to use trade agreements as instruments of 'politics by proxy': as substitutes of a foreign policy that remains largely outside EC or EU competence. These considerations explain why, from the perspective of the EU, trade negotiations with Chile have always been approached as a 'reward to a friend' that cannot be ignored if negotiations are launched with other Latin American countries or blocs (MERCOSUR in 1996 and Mexico now) or as an easy way to provide content for bi-regional relations and summits (the Association Agreement in 2002) much more so than as an instrument of economic policy.

It should also be emphasised that, from Chile's perspective, the approach to the negotiation of bilateral trade agreements has always been different from that of any other country in Latin America, and does not fit the logic of the matrix of offensive and defensive interests. Bilateral Chilean trade policy is simply the result of a unilateral trade policy based on a flat rate of duty that is progressively diminished (see Section 2.2). On that basis, Chile has been pursuing a horizontal liberalisation policy, negotiating as many bilateral agreements as possible to obtain preferential access to a number of foreign markets

Some introductory arguments discussed in the parallel study for Mexico also apply to the incoming negotiations with Chile. The more important argument concerns the distinction between 'external' (i.e. the negotiation and signature of international agreements) and 'internal' (i.e. the enactment of internal legislation) EU competences. The EC's exclusive competence on international trade has always covered both aspects. However, does the enlargement in the scope of the EU's exclusive competence on trade policy brought about by the Lisbon Treaty cover both its external and its internal competences, for

[4] Craig VanGrasstek explains this very aptly in his course on Trade and International Political Economy at the University of Barcelona's Master of Law in International Economic Law and Policy (Master IELPO: www.ielpo.org). See also, for example, his study on Services and Regional Trade Agreements: VanGrasstek, C. (2011), 'The Political Economy of Services in Regional Trade Agreements', OECD Trade Policy Working Papers, No. 112, OECD Publishing. doi: 10.1787/5kgdst6lc344-en. It is sufficient to refer to the list of countries with which the US has signed bilateral trade agreements. See https://ustr.gov/trade-agreements/free-trade-agreements.

[5] Concerning specifically EU-Latin America relations, this issue was discussed in the International Conference on Strategic Challenges on EU-Brazil relationship held in Brussels on May 2012. See https://ghum.kuleuven.be/ggs/projects/eu_brazil/documents/programme-book.pdf, page 21. https://ghum.kuleuven.be/ggs/events/2012/05_2012/eubrazilconferencereportfinalv-1.pdf, page 16.

example, in an area of utmost importance for the negotiations with Chile, like that of foreign direct investment (FDI)?

- Should this be interpreted to mean that Member States lose their competences to enact legislation affecting FDI, which is instead conferred to the EU as an exclusive competence? If this is the case, is the EU able to cope with such an overwhelming burden? At first glance, the answer is decisively negative.[6]
- However, if the answer is negative legally or in practice, and it is accepted that Member States retain internal competence in the area of FDI even if they have conferred to the EU the exclusive competence to negotiate international agreements, how can the EU define a coherent (and ambitious) external policy in such an important area that remains under the internal competence of the Member States?

Chilean negotiators are extremely experienced and highly qualified. Clear answers must be ready if they raise these questions.

[6] This key political problem is often neglected. The paradigmatic example, which is very troubling and systematically ignored, is that of the EC's exclusive competence on the General Agreement on Trade in Services (GATS) mode 1 of supply of services: cross-border supply. The Court of Justice of the European Union, in its Opinion 1/94 of 15th of November 1994 (Distribution of competences between the EC and Member States concerning WTO agreements), ruled that this fell under exclusive EC competence. However, the EC was, and now the EU remains, unable to exercise this competence and Member States continue to sign agreements in this very broad area with the tacit acceptance of all EU institutions.

1 Background of the trade pillar of the current EU-Chile Association Agreement

As in the case of Mexico, as discussed in the parallel study by the authors, the perception of the present state of trade relations with Chile is obscured by a lack of adequate understanding of its legal framework as well as of the policy behind it. This section of the study will attempt to clarify this legal framework and its corresponding policy, and seeks to provide a clear and cohesive source of information for future discussions in this area.[7]

1.1 The historical context

As discussed in the parallel study by the authors on Mexico, the 'new era' of the EC's relations with Latin America was initiated in the 1990s when the European Commission recommended to the Council the launch of negotiations with MERCOSUR, Chile (a year later), and Mexico (two years after). It is difficult to determine the exact date of the origin of such proposals, that is to say, the exact moment in which the services of the Commission began their elaboration. However, it is public and noticeable that such services put pressure to the governments of MERCOSUR states to modify the 1991 Treaty of Asunción in order to vest MERCOSUR with legal personality and, therefore, be able to envisage an interregional agreement 'between organisations'. As this modification was crystallised in the Ouro Preto Protocol in December 1994, the inception of the Commission's initiative with a view to concluding an agreement with MERCOSUR shall be found considerably before that date.

This chronological accuracy is important as it clarifies a much-generalised misunderstanding in relation to the opening of negotiations with Chile. The Commission's initiative to negotiate an agreement with Chile was not a reaction to the free trade agreements between Chile and the countries that had concluded the North American Free Trade Agreement (NAFTA) – Canada, Mexico, and United States (as the launching of negotiations with Mexico should also not be interpreted as a reaction to NAFTA).

Rather, the Commission followed its own initiative to negotiate a series of new agreements with countries and zones of Latin America, first with MERCOSUR as a whole and then followed by Chile and Mexico. The origin of this initiative shall be placed in 1992/1993. Back then, even if the NAFTA process was underway, its effects after its entry into force in 1994 were not yet ascertained. We must recall that NAFTA's ratification process was heavily contested both in Canada and the United States, especially during 1993.[8]

In December 1994, Chile was invited to start negotiations to join NAFTA, [9] a process that did not succeed, as the Clinton Administration was unable to obtain a special mandate to negotiate on behalf of the United States Congress ('fast track').[10] This led Chile to adopt a new strategy: negotiating separate free trade agreements (FTAs) with each NAFTA member. [11] Thus, in December 1996, Chile entered into an FTA

[7] This section draws heavily from Ramón Torrent, 'Las Relaciones Unión Europea-América Latina En Los Últimos Diez Años: El Resultado de La Inexistencia de Una Política' [2005] Barcelona, OBREAL-EULARO (available only in Spanish).
[8] Jeffrey S. Lantis, *The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective* (Oxford University Press 2009) 34-50.
[9] NAFTA is a free trade agreement between Canada, Mexico, and the United States that was signed in San Antonio, Texas on 17 December 1992, and came into force on 1 January 1994.
[10] Felipe Larraín, 'América Latina a Las Puertas Del Siglo XXI: Hacia Una Asociación Transpacífica' in Pilar Alamos, Luz O'Shea and Manfred Wilhelmy (eds), *América Latina y Asia-Pacífico: oportunidades ante la crisis* (1st edn, Instituto de Estudios Internacionales, Universidad de Chile 1998) 379 <http://www.libros.uchile.cl/files/presses/1/monographs/284/submission/proof/index.html#9> accessed 13 June 2014.
[11] Directorate General of International Economic Affairs (DIRECON), *Chile 20 Años de Negociaciones Comerciales* (Ministry of Foreign Affairs of Chile 2009) 66 <http://www.direcon.gob.cl/wp-content/uploads/2013/09/Chile-20-a%C3%B1os-de-negociaciones-comerciales.pdf> accessed 12 June 2014.

with Canada, and in 1998, with Mexico. After lengthy negotiations, Chile finally signed an FTA with the United States in June 2003, which entered into force on 1 January 2004.

The EU's negotiating strategy with Chile was modelled on the precedent of MERCOSUR, and the initiative was subordinated to the MERCOSUR strategy. In fact, the opening of negotiations with Chile was defended as an instrument aimed at pressuring Chile to integrate with MERCOSUR.[12] For Chile, this was very difficult to accept, because Chile had been invited to negotiate bilaterally and, at that time, it had no binding agreement with the South American bloc. In addition, there was some belief that the priorities of Chile and MERCOSUR, facing negotiations with the EU, were very different and, accordingly, so were the degrees of commitment that each was willing to assume.[13] The differences between Chile and MERCOSUR were in areas like tariff reductions and its exceptions (particularly on 'sensible' products), and the effects of the most-favoured nation (MFN) clause of the Latin American Integration Association (ALADI),[14] a regional organisation with Argentina, Brazil, Chile, Paraguay, and Uruguay among its member states.[15]

1.2 The 2002 agreement

Chile and the EU signed a Framework Cooperation Agreement on 21 June 1996, with the objective of establishing a political and economic association. This agreement entered into force on 1 February 1999. The agreement is a 'mixed' agreement,[16] as it was signed on the EU side both by the EC and by its Member States. On 24 November 1999, the first meeting of the EU-Chile Joint Council, established in the framework agreement, took place in Brussels. The Joint Council set out the structure, methodology, and calendar for negotiations of a political and economic association agreement between Chile and the EC and its Member States.

Negotiations towards the EU-Chile Association Agreement (AA) began in late 1999. Ten rounds of negotiations were held, distributed alternately between Santiago and Brussels, and the negotiations gained momentum as a way of giving content to the EU-Latin American and Caribbean (LAC) Summit to be held in Madrid in 2002 (see below). They were finalised on 26 April 2002 and a final agreement was signed on 18 November 2002 and entered into force provisionally, in matters falling under EC competence (mainly trade and trade-related matters), on 1 February 2003. In May 2004, an additional protocol to the AA was added to take into account the enlargement of the EU, and the full agreement entered into force on 1 March 2005.

[12] Ramón Torrent, 'Las Relaciones Unión Europea-América Latina En Los Últimos Diez Años' (n 13) 27.
[13] Directorate General of International Economic Affairs (DIRECON), *Chile 20 Años de Negociaciones Comerciales* (n 15) 150.
[14] Under Art. 44 of the Treaty of Montevideo that created ALADI, any advantages, favourable treatment, franchises, immunities, and privileges which a member country applies to products originating from or bound to any other member country or non-member country, pursuant to decisions or agreements not foreseen in the treaty shall be immediately and unconditionally extended to the other member countries. An Implementation Protocol of Article 44 of the Treaty of Montevideo, agreed in June 1994, allows ALADI members that have granted preferences to third countries the right not to have to apply this MFN clause, if negotiations are launched to compensate ALADI members. Eugenia López-Jacoiste Díaz, 'The Latin American Integration Association' in Marco Odello and Francesco Seatzu (eds), *Latin American and Caribbean International Institutional Law* (TMC Asser Press 2015) 34 <http://link.springer.com/10.1007/978-94-6265-069-5_2> accessed 14 April 2016.
[15] Directorate General of International Economic Affairs (DIRECON), *Chile 20 Años de Negociaciones Comerciales* (n 15) 96-114.
[16] 'Mixity' is the term, in the jargon of EU experts on foreign relations, that refers to whether an 'EU agreement' with a third country is signed and concluded by the EU alone (the EC before the Lisbon Treaty), or by the EU and all its Member States ('mixed agreement'). As the alternative must be discussed on the basis of the distribution of competences established by the Treaties between the EU and its Member States, the discussion becomes legal while, in fact, it is also, and even primarily, political, as the following question demonstrates: If the European Union plus its Member States must collectively become a 'global actor' as the United States, China, India, or Russia, can the European Union alone – with its very limited 'competences by attribution' – or the Member States alone – without the competences conferred to the Union – be able to face those other global actors? The answer seems clearly negative. Only the 'compound' actor EU-plus-Member States has the competences to face the US, China, India, or Russia. 'Mixity' may be a problem in its management, but it is the only realistic approach if the EU-plus-Member States must be a real global actor in its deeds, not just in its words.

The conclusion of the AA was a major step in the Chilean strategy of international integration, as it opened the doors to one of the largest world economies. The agreement generated many opportunities for growth and economic development in the country. For example, the EU-Chile agreement produced a major increase in bilateral trade that has been in favour of Chile for almost all the past decade.[17] Additionally, the AA with Chile was one of the first 'fourth generation' agreements, as is not only incorporates the trade pillar, but also political dialogue and a broad scope of cooperation, including 'development cooperation'.[18] That said, the chapter on development cooperation is empty of legal obligations (in its language and because its provisions are not a 'legal basis' for the EU's development policies and activities, as this legal base remains that of the EU's internal legislation). However, the AA has opened the doors of further economic cooperation in areas such as air services, fisheries, nutritional composition of food and food advertising, and especially on wines and spirited drinks – as it will be later explained in more detail. [19]

The objectives of the agreement are set out in its Article 55, which refers, among other issues, to: the free movement of goods, trade in goods and services, establishment of investment, intellectual property, technical barriers to trade, trade defence, government procurement, cooperation, and dispute settlement. It is noteworthy that the AA includes three additional agreements: the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Trade in Wine, and the Agreement on Trade in Spirits and Flavoured Drinks, something that shows the importance for both parties of the wine and liquor industry in this agreement.

The AA between Chile and the EU created an institutional structure with an Association Council as the highest bilateral body responsible for administering the AA, which depends on a number of committees responsible for implementing the chapters included in it. The committees established are: 1) the Association Committee, 2) the Joint Committee on Sanitary and Phytosanitary (SPS) Measures, 3) the Measures Committee of Standards and Technical Regulations Conformity Assessment, 4) the Special Committee on Customs Cooperation and Rules of Origin, 5) the Joint Committee on Trade in Wines, and 6) the Committee Set on Trade and Flavoured Spirits.

The EU-Chile AA established a programmed tariff reduction for Chilean industrial products, fishing, and agricultural products of 0, 3, 4, 7, 10, 'R' (50% of the MFN), and 'SP' (100% of the ad-valorem). Chile also established preferences tariff on goods coming from the European bloc through a tariff reduction program at 0, 5, 7, and 10 years. It added that a group of products (of both parties) gained access through a preferential quota.[20] On 1 January 2013, the longest period for tariff reduction established by both parties (10 years) was completed, and thus the universe of products in the respective programs currently enters duty free.

Regarding trade in services, the AA considers similar coverage and rules to the General Agreement on Trade in Services (GATS) being applicable to the four modes of supplying services (cross-border trade, consumption abroad, commercial presence, and presence of natural persons), and including rules on national treatment, market access, and domestic regulation. However, no MFN clause is included.[21] The agreement considers a positive list of liberalisation (a first for Chile at the time of the negotiation of the agreement) and special provisions for telecommunications services, international maritime transport, and

[17] Roberto Dominguez, *EU Foreign Policy Towards Latin America* (Springer 2015) 80.
[18] Directorate General of International Economic Affairs (DIRECON), 'Evaluación de Las Relaciones Comerciales Entre Chile Y Unión Europea a Diez Años de La Entrada En Vigencia Del Acuerdo de Asociación' (n 3) 1.
[19] Roberto Dominguez (n 24) 81.
[20] Directorate General of International Economic Affairs (DIRECON), 'Evaluación de Las Relaciones Comerciales Entre Chile Y Unión Europea a Diez Años de La Entrada En Vigencia Del Acuerdo de Asociación' (n 3) 8.
[21] ITAQA (n 2) 92.

financial services. Audio-visual services, national maritime cabotage, and air transport services (except certain specific sectors) [22] were excluded from the services chapter.[23]

For the EU, the commitments made under the AA included most types of services in all sectors (outside transport, health-related, cultural, or recreational services), resulting in a very high level of commitments. With respect to Chile, the agreement brought significant commitments in sectors such as distribution, recreation, tourism, business, and transport. However, commitments were limited in several sectors (like educational, environmental, construction, and health-related services), and only intermediate in financial services and telecommunications.[24]

The EU-Chile AA establishes a comprehensive and fast liberalisation agenda, which would seem to suggest a significant impact on trade. However, not all trade effects could be easily considered as a direct consequence of the agreement. We must recall that since 1973, Chile unilaterally changed its trade and investment policy, moving from substitution of imports to the promotion of exports, liberalising the domestic financial system, granting national treatment to foreign investors, and unilaterally adopting a standard reduction of tariffs.[25] In that context, the relatively low level of initial tariffs would point to a moderate size of these trade effects in practice. It is important to highlight that Chile started a unilateral policy of reducing tariffs and applying them at a flat rate since the second half of the 1970s. At that time, the unilateral reduction of tariffs was accompanied by periodic (but sometimes erratic) adjustments of exchange rates for imported products, which had already been announced from 1974, and then led to a gradual process of reduction of the maximum tariff from 60% in 1977 to a uniform tariff of 10% by June 1979, together with an elimination of tariff distortions, bans imports and quantitative restrictions, and the advance deposit system with high fees.

Notwithstanding the lower level of tariffs, studies show a strong and statistically significant effect of the agreement on EU exports and an economically (but not statistically) significant effect on EU imports. The effects of the EU-Chile AA are considered important by available impact studies, and EU exports to Chile have increased markedly as a result of the FTA.[26]

1.3 The (lack of) trade policy behind the EU-Chile Association Agreement

From a policy perspective, and looking to future negotiations, it is much more interesting (and revealing) to discuss the policy behind the 1996 and 2002 Agreements and its motivations than the details of its content.

We will discuss these motivations on the basis of Torrent (2005).[27] As the discussion follows very closely that of the parallel study on Mexico, we will summarise some of its aspects.

[22] These sectors are: (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) the selling and marketing of air transport services; and (iii) computer reservation system (CRS) services. EU-Chile AA, Title III, Chapter I, Art. 95.
[23] Directorate General of International Economic Affairs (DIRECON), *Chile 20 Años de Negociaciones Comerciales* (n 15) 158.
[24] ITAQA (n 2) 106.
[25] Directorate General of International Economic Affairs (DIRECON), *supra* note 15, at 58-59; and Rodrigo Polanco, 'The Chilean Experience in South-South Trade and Investment Agreements' (Social Science Research Network 2014) FGV Direito SP Research Paper Series 115 <http://papers.ssrn.com/abstract=2532585> accessed 12 February 2016.
[26] Copenhagen Economics (n 2) 8.
[27] As already said, this section draws on Ramón Torrent, 'Las Relaciones Unión Europea-América Latina En Los Últimos Diez Años' (n 13). He wrote that piece, for a great part, in first person. The author was, at the time of the negotiations with MERCOSUR, Chile, and Mexico, the Director for External Economic Relations in the Legal Service of the EU Council and was deeply involved in the negotiating process and the design of the EU's strategy and the institutional framework set up by the agreement.

(1) What were the motivations behind the Commission's initiative to negotiate a new series of agreements with the countries and sub-regions of Latin America?

During the 1990s, the EC (on its own or jointly with its Member States) drove itself towards a race of negotiations of bilateral agreements with all the countries and regions of the globe. Therefore, it would have been surprising that Latin America had been left out of the destinations of the race. In other words: one should not look for too many specific reasons to explain why Latin America would *also* be included in this wave of new agreements. Rather, what would have required a specific explanation would have been *not* including it (this concerns, in Latin America, the Andean Community and Central America, judged by the Commission services as 'not yet ripe' because of its violent internal conflicts).

All the connoisseurs of Brussels' reality knew at the time that these initiatives involving new international agreements were not taken on the basis of economic considerations but exclusively on the basis of very simplistic 'geo-strategic considerations', such as 'a reaction to the fall of the Berlin Wall', 'a reaction to the dissolution of the Soviet Union', 'we should build a Mediterranean policy', and 'how we are going to forget Latin America'.[28]

The Commission's initiative to negotiate a new round of agreements with Latin American countries and regions started with MERCOSUR; we should not forget this. In addition, the essential motivation in the minds of those who conceived the agreement with MERCOSUR was not economic but purely political-institutional. It was meant to bring to that new wave of agreements with all the countries of the world a specific contribution: the first 'inter-regional' agreement between two organisations of regional integration (the EC and MERCOSUR).

(2) The agreement with Chile: le cavalier seul of Latin America

The reasons behind the successful completion in 2002 of negotiations between the EC and its Member States and Chile, with a view to concluding a trade and economic agreement that would replace the 'empty' institutional framework agreement of 1996, are particularly significant for the present study.

Indeed, if a political objective has always been preached for EU policy intended to Latin America, it has been to promote integration processes in the region. This being so, how it is justified that the first, and, for many years, the only, agreement with a state from South or Central America endowed with effective economic content is the one signed in 2002 with Chile, *le cavalier seul* in Latin America and the country which has always been reluctant to join Latin American regional projects?

It could be argued that even if there was no specific economic policy motivation for the launching of the new wave of agreements with Latin American countries and regions in the first half of the 1990s, a specific set of motivations developed for Chile in the second half of the decade, and it would explain why the EU-Chile AA was concluded in 2002. Such an argument does not seem to fit the facts.

The Commission's proposal in 1994-95 for an agreement with MERCOSUR was intended to reach a free trade zone. It was in the discussion within the Council where the two-stage solution was adopted: first, the creation of an institutional framework deprived from economic obligations (the agreement of 1995), and then the negotiations to add content to the framework (which are still underway 20 years later). It was, in essence, the same solution adopted for Mexico in 1997 and, previously, in the 1996 Agreement with Chile. In fact, the rest of the participants to the negotiations within the EU Council, that is to say, the representatives of the other 13 Member States' governments, would have been pleased with reproducing for Chile the framework agreement with MERCOSUR (they did the same for Mexico).

[28] The current existing procedures on stakeholder consultation, scoping, etc. were introduced precisely in order to change this approach based exclusively on very simplistic 'geo-strategic considerations'.

Therefore, it is clear that the initial content of the initiative was the same for Chile, Mexico, and MERCOSUR. The European Commission proposed for them, for Central and Eastern European countries, or for Mediterranean countries, the constitution of free trade zones; and this was completely independent from Chile's specific circumstances, from the negotiation of NAFTA, and from its effects on Chile.

Certainly, at the time of the AA negotiations with Chile, NAFTA had been nearly six years into force (since 1 January 1994) and its effects were now clearly felt. However, the specificity of the AA with Chile does not come from a strategic decision from EU institutions or from the governments of EU Member States in response to NAFTA. If this had been the case, a much speedier and more effective response would have been possible by simply entering directly into the negotiations for trade liberalisation in 1996 instead of postponing it in time. Three main reasons, completely unrelated to NAFTA, explain this specificity:

- The dynamics of the 'summits' with third countries and the need for the government of each Member State to have a 'good balance sheet' for its rotating six-month presidency of the EU Council. Indeed, the Spanish government wanted its presidency of the EU during the first half of 2002 to be a success. As in the course of the Spanish presidency, the second EU-LAC Summit was being held, and the Spanish government also wanted it to attain tangible results. As a means to achieve this objective, it raised the possibility to formally and solemnly open, in the Summit, trade negotiation processes with the Andean Community and Central America similar to that already underway with MERCOSUR. The Commission flatly rejected this possibility (indeed, it was defending, since Pascal Lamy had become Trade Commissioner, a moratorium on opening new bilateral trade negotiations).[29] However, on the other hand, 'something had to be given' to the Spanish presidency of the Council. What was given in exchange was the acceleration of the negotiation with Chile.[30] In January 2002, the Council of Ministers of the EU issued a policy statement that expressed support for the European Commission to continue its work with a view to concluding negotiations in the framework of the Second Summit between the EU and Latin America and the Caribbean, to be held in Madrid in May 2002. With this declaration, the negotiation with Chile was formally separated from the process with MERCOSUR in whose context it had been born.[31]

- The interest of the European Commission to give practical effect to the extension to 'trade in services' of the scope of 'Commercial Policy' as an exclusive competence of the EC, brought about by the Treaty of Nice in 2001. Indeed, the European Commission had always battled to interpret the EC Treaty article on Commercial Policy (Article 133 after the Amsterdam Treaty re-numbering, former Article 113) as a 'horizontal' article embracing the totality of external economic relations (or as much of them as possible). This strategy failed when the Court of Justice rejected the European Commission's thesis in its Opinion 1/94 of 15 November 1994 on the distribution of competences between the EC and its Member States on the World Trade Organization (WTO) agreements issued from the Uruguay Round. After this defeat, the European Commission's strategy was that of modifying that article and enlarging its scope. This strategy, continued later

[29] See Ramón Torrent, 'Las Relaciones Unión Europea-América Latina En Los últimos Diez Años' (n 9). The Summit did lead to the opening of negotiations with both the Andean Community and Central America, but only to sign pure 'political agreements' completely empty of economic content, which, furthermore, were completely forgotten after their solemn signature in Rome in December 2003. The agreement with Central America, for example, remained without entering into force until the signature of a new AA in 2012 (sic) advised to give a new life to the dormant 2003 agreement and complete its ratification procedures. The only objective of this was to give life to the Political Dialogue and Cooperation chapters of the 2012 AA (which simply reproduced what was already in the 2003 agreement) pending its entry into force.
[30] ibid 50-51.
[31] Directorate General of International Economic Affairs (DIRECON), *Chile 20 Años de Negociaciones Comerciales* (n 15) 153-154.

in the negotiations of the 'Constitutional' and the Lisbon Treaties, had a first success in the Treaty of Nice with the introduction of the GATS/WTO notion of 'trade in services' within the scope of the EC's Commercial Policy. We will discuss later on the consequences of the adoption of this GATS/WTO approach and the abandonment of the original EC Treaty approach. What matters now is to indicate that, for the European Commission, the negotiations with Chile became a golden opportunity to give effect to this change in the Treaty and to exercise this new competence.

- The great interest of Chile in adding the agreement with the EU to its list of bilateral trade agreements. Furthermore, Chile defined the agreement as a 'necessary association',[32] and gave particular importance to the fact that negotiations included not only a trade pillar, but also a political and a cooperation pillar in a wide range of activities (even if these two pillars are quite empty of legal and practical effects).

After its conclusion, the EU-Chile AA came to be seen as a benchmark for EU trade relations with other partners,[33] and it was presented as an illustration of a 'new' EU trade policy. Its coverage was broader than that of the EU agreements with Mexico and South Africa, and, as mentioned above, it included not only trade in goods but also services, while it continued including the typical provisions on cooperation policy and on political dialogue already developed in other AAs. The AA also included new provisions which had not been included in other FTAs signed by either the EU or by Chile, like appellations of origin, WTO plus provisions on SPS measures, trade facilitation, government procurement, and intellectual property rights.

This approach was followed and deepened in subsequent agreements concluded a few years later by the EU, like the FTAs with Central America, Colombia, and Peru. This situation has, however, changed with the conclusion of the EU-South Korea and the EU-Singapore FTAs, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and, recently, the EU-Vietnam FTA, where EU negotiators have introduced more ambitious clauses, especially in areas like intellectual property and technical barriers to trade (TBTs), trade and sustainable development, and investment, among others.

2 Comparison of the trade pillar of the current Association Agreement with the new generation of EU free trade and investment agreements

After the conclusion of the EU-Chile AA, the EC's trade policy has experienced important changes. Pascal Lamy finalised his term as Trade Commissioner in 2004 and this led to the abandonment of the multilateral approach he had tried to implement in the area of trade policy (with the exception, precisely, of the EU-Chile AA). This change in approach became a formally approved change of policy with the approval of the EU Council of the European Commission's Communication 'Global Europe: Competing on the World' from October 2006, which re-launched the process of bilateral negotiations. A new set of bilateral agreements has already entered into force following the 'Global Europe's' approach.

This is why this section compares selected trade and investment chapters of the EU-Chile AA with the new generation of FTAs that the EU has recently completed, including EU-Korea, EU-Singapore, EU-Vietnam, and EU-Canada, under the assumption that one or a mix of all of them might be considered as a benchmark for the future update of the EU-Chile AA. As requested in the ToR, the following sections

[32] ibid 147.
[33] See ToR, p. 1.

examine and compare disciplines in government procurement, foreign investment, regulatory cooperation, and sustainable development, as well as other areas where the level of ambition of the existing EU-Chile AA can be increased.

For a more comprehensive analysis of the main content of the EU-Chile AA in trade in goods and trade in services, see the studies that the Directorate General for Trade of the European Commission (DG Trade) has carried out or commissioned on the implementation of the EU trade agreements with Chile.[34]

2.1 Government procurement

(1) EU-Chile Association Agreement

Although Chile is not a member of the WTO's Agreement on Government Procurement (GPA), but became an observer of the agreement on 29 September 1997, the EU-Chile AA applies the complete 1994 GPA framework to the procurement practices of the two parties[35] on issues like coverage, national treatment, transparency, contract award procedures, contract award criteria, technical specifications, regulatory safeguards, bid challenge, and technical cooperation.

Title IV of the Agreement deals with government procurement from Articles 136 to 162, with the objective of ensuring the effective and reciprocal opening of their government procurement markets (Article 136).

The main topics included in Title IV of the AA concern the coverage of the agreed liberalisation (including lists of covered entities, goods, services, and threshold values), non-discriminatory access to the agreed markets, legal and transparent procedures including clear challenge procedures, and the use of information technology. Even though the list of administrations varies across Member States, reflecting differences in government structures, the list of entities covered is broad. The Agreement guarantees respect for principles such as national treatment, non-discrimination, and transparency, and an important set of rules that apply to central entities, regional entities, and public enterprises.[36]

a) Scope and coverage

Under Article 138, the Agreement covers any type of procurement methods of goods, services, or a combination thereof, including purchase or lease, or rental or hire purchase, with or without an option to buy, and works carried out by public entities of the Parties for governmental purposes and not with a view to commercial use.

Article 137 includes a fairly limited list of exclusions, including: (i) contracts awarded pursuant to certain international agreements;[37] (ii) non-contractual agreements or any form of government assistance or cooperation programmes; (iii) financial services; and (iv) contracts for the acquisition or rental of land, existing buildings, or other immovable property or concerning rights thereon, the acquisition, development, production, or co-production of programme material by broadcasters and contracts for broadcasting time, arbitration and conciliation services, employment contracts, and research and

[34] Copenhagen Economics (n 2); and ITAQA (n 2).
[35] Stephen Woolcock, 'Public Procurement and the Economic Partnership Agreements: Assessing the Potential Impact on ACP Procurement Policies' [2008] London: Commonwealth Secretariat 12 <http://www.normangirvan.info/wp-content/uploads/2008/05/commonwealth-sec-procurement-paper-11th-may-docfinal2.pdf> accessed 2 March 2016.
[36] ITAQA (n 2) 27.
[37] International agreements intended for the joint implementation or exploitation of a project by the contracting Parties, relating to the stationing of troops or the particular procedure of an international organisation.

development services.[38] Public works concessions are under the scope of the agreement but with special rules specified in Annex XIII.

Entities covered are central level (GPA Category I), sub-central level (GPA Category II), and public enterprises and utilities (GPA Category III), with different thresholds for goods, services, and works, specified in Annexes XI (for the EU) and XII (for Chile). Under Article 141, entities are not allowed to split up a procurement process, nor use any other method of contract valuation with the intention of evading the application of these provisions. Coverage can be consider somewhat GPA 'minus', as the EU offered fewer Category III entities than under the GPA and still retained some sectors for reasons of reciprocity.[39]

According to Article 159, a Party may modify its coverage if it notifies the other Party of the modification and provides, within 30 days following the notification, appropriate compensatory adjustments to its coverage in order to maintain a level of coverage comparable to that existing prior to the modification. No compensatory adjustments are needed for rectifications of a purely formal nature, minor amendments, and when the control or influence of the government on an entity has been effectively eliminated as a result of privatisation or liberalisation.

Following the GPA text,[40] Article 161 of the AA considers exceptions to the application of the public procurement chapter, as any Party is prevented from adopting or maintaining measures: (i) necessary to protect public morals, order, or safety; (ii) necessary to protect human life, health, or security; (iii) necessary to protect animal or plant life or health; (iv) necessary to protect intellectual property; or (v) relating to goods or services of handicapped persons, of philanthropic institutions, or of prison labour. These exceptions can be adopted or maintained provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between them.

b) Non-discriminatory treatment

Article 139 enshrines the principles of national treatment and non-discrimination for procurement in the covered entities. Among other points, it establishes that each party will provide to the products, services, and suppliers of the other party no less favourable treatment than that accorded to domestic products, services, and suppliers. Like in the EU-Mexico Agreement, it is stipulated that no less favourable or non-discriminatory treatment shall be given to a locally established supplier because of the foreign affiliation to or ownership by a person of the other party, or of the country of production of the good or service being provided.

Additionally, Article 140 stipulates that each Party shall ensure that its entities do not consider, seek, or impose offsets in the qualification and selection of suppliers, goods, or services, or in the evaluation of bids or the award of contracts.

Although no MFN provision is explicitly considered, if either Party offers in the future to a third party additional advantages with regard to access to their respective procurement markets beyond what has been agreed in the AA, it shall agree to enter into negotiations with the other Party with a view to extending these advantages to it on a reciprocal basis by means of a decision of the Association Committee (Article 160).

[38] Except those where the benefits accrue exclusively to the entity for its use in the conduct of its own affairs, on the condition that the service is wholly remunerated by the entity.
[39] Stephen Woolcock (n 43) 12.
[40] See GPA 1994, Art. XXIII, and GPA, Art. III.

c) Transparency and contract award procedures

On transparency, the EU-Chile AA considers the provision of information of regulation, administrative rulings, and procedures that would enable effective bids (Article 142); publications of notices of tendering opportunities and planned procurement (Article 147); information of unsuccessful bids on request (Article 154); and the provision of a contract's statistics (Article 158), but only when a Party has not assured an effective level of compliance of the agreement.

Article 156 provides that the Parties shall, to the extent possible, endeavour to use electronic means of communication and implement an electronic information system to improve market opportunities and permit efficient dissemination of information on government procurement (particularly on tender opportunities and transmissions of offers), while respecting the principles of transparency and non-discrimination.

Provisions for procurement procedures are included in Articles 143 to 155. Allowed tendering procedures consider both open and selective (restrictive) tendering. Single tendering is possible only in exceptional cases (Articles 143-146). Technical specifications included in tender documentation shall be in terms of performance rather than design or descriptive standards, and based on international standards, or in their absence, in national technical regulations, nationally recognised standards, or building codes (Article 149). Contract award is to the lowest price or most advantageous bid based on previously determined criteria (Article 153).

One especially relevant provision is Article 155 on 'bid challenges', which grants to suppliers rights to non-discriminatory, timely, transparent, and effective procedures to challenge the procedures for awarding contracts.

d) Review and Cooperation

According to Article 162, the Association Committee (established by Article 6 of the AA) shall review the implementation of the government procurement provisions every two years, unless otherwise agreed by the Parties, and take appropriate action in the exercise of its functions. These actions include coordinated exchanges between the Parties regarding the development and implementation of information technology systems in the field of public procurement, and the possibility to make appropriate recommendations regarding the cooperation between the Parties.

The AA includes vague cooperation commitments on public procurement. Article 33 stipulates that cooperation between the Parties in the field of public procurement will seek to provide technical assistance, paying special attention to the municipal level. Article 157 adds that Parties shall endeavour to provide this through the development of training programs with a view to achieving a better understanding of their respective government procurement systems, its statistics, and respective markets.

(2) The new generation of EU FTAs

The EU-South Korea FTA (in force since July 2011) is the first of a 'new generation' of EU FTAs. However, on public procurement, its Chapter 9 merely reaffirms the rights and obligations of the Parties under the WTO's GPA, to which both Parties are members.

Although Canada and the EU are both parties to the GPA, Chapter 19 of CETA deals with government procurement in 19 provisions and in separate market access offers, which include different thresholds that determine whether procurement is covered under an agreement, for Canada and the EU, for covered entities, goods, and services that largely follows the GPA framework. Similar provisions are also found in the recent EU Agreement with Singapore, which is also Party to the GPA. However, while CETA does not

make an explicit reference to the GPA, the treaty with Singapore even considers the need of adjusting its text if the GPA is amended or superseded by other agreements (Article 10.20).

In the case of the EU-Vietnam FTA, although Vietnam is not a Party of the GPA, the chapter on public procurement essentially follows its approach.

Unless otherwise mentioned, the comparison made below largely follows the CETA text, as it is the one with more detailed provisions in this subject matter.

a) Scope and coverage

Like in the EU-Chile AA, Chapter 19 covers procurement by different contractual means, such as purchase, lease, and rental or hire purchase, with or without an option to buy. Article 19.1 contains a series of useful definitions of the terms used in the chapter, something that is also found in Article 138 of the EU-Chile Agreement.

The scope of entities that are covered by the procurement rules of CETA is similar to that in EU-Chile, as CETA also applies to central and sub-central level entities and public enterprises and utilities. With notable exclusions,[41] almost all Canadian municipal government procurement will be covered for the first time by an international procurement agreement, including most utilities, Crown corporations, and the broader 'MASH' sector (municipalities, academic institutes, school boards, and hospitals). EU commitments include EU entities, central government entities, regional or local contracting authorities, contracting authorities that are bodies governed by public law as defined by the EU Procurement Directive, and EU utilities that are contracting authorities. Exceptions are found in specific areas, like the purchase of water and the supply of energy or fuels, the exploration or extraction of, oil, gas, coal, or other solid fuels, the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes.

Unless otherwise specified, CETA's public procurement chapter covers all goods with certain exclusions on the side of Canada for procurement by Canadian defence and enforcement forces,[42] and some regional exceptions like the procurement of mass transit vehicles in Ontario and Québec and of certain goods of Manitoba Hydro's procurement. On the European side, the exclusions concern procurement by EU Ministries of Defence. Services are only included if they are explicitly listed in the market access offers and include construction and professional services.

General exceptions are included in similar terms as in the GPA and in the EU-Chile AA.[43] However, the agreement also considers security exceptions for the protection of each Party's essential security interests relating to the procurement of arms, ammunition, or war material, or to procurement indispensable for national security or for national defence purposes.

The EU-Vietnam FTA also has a similar coverage, as it applies to both central and sub-central level entities. For the goods and services purchased by central government entities, Vietnam's permanent threshold is set at 130,000 Special Drawing Rights (SDRs) with a transition period of 15 years to reach it. An initial transitional threshold is set it at 1.5 million SDRs.

[41] Exceptions include selected entities like Infrastructure Ontario (Ontario's local hydro utilities) and NALCOR (the provincial energy corporation for Newfoundland and Labrador).

[42] These include: the Department of National Defence, the Royal Canadian Mounted Police, the Department of Fisheries and Oceans for the Canadian Coast Guard, the Canadian Air Transport Security Authority, and provincial and municipal police forces.

[43] Subject to the requirement that measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or are a disguised restriction on international trade, Art. 19.3 consider as exceptions, measures (a) necessary to protect public morals, order, or safety; (b) necessary to protect human, animal, or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of persons with disabilities, of philanthropic institutions, or of prison labour.

Vietnam's coverage includes central government entities and other categories, like state-owned enterprises (Vietnam Electricity and Vietnam Railways) and universities (Vietnam National University, Hanoi and Vietnam National University, Ho Chi Minh City). Regarding sub-central government coverage, Vietnam only lists two cities in the EU FTA (Hanoi and Ho Chi Minh City). Similarly, the EU is only opening to Vietnam certain specific areas, like the regions of Brussels, Berlin, and London, and also limits its coverage of public bodies at this level to those providing certain services: health, higher education, and research. However, the agreement calls for future negotiations on the expansion of sub-central coverage 15 years after the EU pact enters into force. The agreement gives flexibility to Vietnam to implement several obligations. For example, Vietnam is exempted from dispute settlement challenges with regard to its procurement obligations for five years, and may use offsets for 18 years. In delaying the implementation of other provisions, the EU sets a 10-year limit. [44]

In the EU-Singapore FTA, both parties have agreed to expand their commitments. The EC estimates that the coverage of Singaporean procurement entities has increased from about half of relevant entities to about three quarters, including key entities in certain utilities sectors. At the same time, Singapore has significantly expanded the types of public service contracts to be covered by its commitments on transparency and non-discrimination.[45]

Similar to EU-Chile, in CETA, each party may modify its coverage by previous notification to the other Party in writing, including a proposal of appropriate compensatory adjustments, unless the modification is negligible in its effect or covers an entity over which the Party has effectively eliminated its control or influence. Adjustments and formal modifications are allowed (Article 19.18). Only these adjustments or modifications may trigger the dispute settlement procedure of the treaty. The EU FTAs with Singapore and Vietnam include broader provisions for modifications and rectifications to the coverage.

b) Non-discriminatory treatment

As in EU-Chile, CETA enshrines the principles of national treatment and non-discrimination principles for procurement in the covered entities, goods, and services (Article 19.4). Within Canada, such treatment includes treatment no less favourable than that accorded by a province or territory, including its procuring entities, to goods and services of, and to suppliers located in, that province or territory. Within the EU, such treatment includes treatment no less favourable than that accorded by a Member State or a sub-central region of a Member State, including its procuring entities, to goods and services of, and suppliers located in, that Member State or sub-central region, as the case may be.

c) Transparency and contract award procedures

Like in EU-Chile, CETA also has rules on the procedures of public procurement, and each entity shall conduct covered procurement in a transparent and impartial manner, applying the same rules of origin that the Party applies in the normal course of trade, without seeking, taking account of, imposing, or enforcing any offset. The procurement chapter also includes rules on information of the procurement system (Article 19.5) and transparency (Articles 19.6, 19.15, and 19.16), including more detail in issues such as notices for intended and planned procurement, the publication of award information and statistics, and the disclosure of information.

As in the agreement with Chile, CETA also includes rules on the use of information technology. According to Article 19.4, when conducting covered procurement by electronic means, a procuring entity shall

[44] Jean Heilman Grier, 'EU-Vietnam FTA: Procurement Commitments' <http://trade.djaghe.com/?p=2476> accessed 15 April 2016.

[45] European Commission – Directorate General for Trade, 'An Informal Overview over the Content of the EU-Singapore FTA' (20 September 2013) <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151723.pdf> accessed 15 April 2016.

ensure that the procurement is conducted using information technology systems and software, including those related to the authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software. A procuring entity shall also maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access. There are also special provisions on electronic auctions (Article 19.13).

However, CETA has a more detailed regulation of the procurement process without referring to the WTO's GPA, including provisions on conditions for participation (Article 19.7), registration systems and qualification procedures (Article 19.8), technical specifications and tender documentation (Article 19.9), deadlines and time-periods (Article 19.10), negotiation (Article 19.11), and limited tendering (Article 19.12). The EU-Singapore FTA also includes provisions on environmental conditions or characteristics defined in the tendering process (Article 10.9). As a novelty, the EU-Vietnam FTA considers that, before launching a procurement, procuring entities may conduct market consultations with a view to preparing the procurement, notably for the development of technical specifications, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency (Article IX b).

Administrative and judicial reviews are considered in broader terms than the 'bid challenge' stipulated in the EU-Chile AA. Under CETA Article 19.17, each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge a breach of the procurement chapter, or, if the supplier does not have a right to directly challenge a breach of the chapter under the domestic law of a Party, a failure to comply with a Party's measures implementing the chapter, arising in the context of a covered procurement, in which the supplier has, or has had, an interest.

d) Review and cooperation

Different from the EU-Chile AA, a special Committee on Government Procurement is created in CETA Article 19.19 for the purpose of exchanging information, assessing the operation of the procurement provisions, and promoting coordinated activities to facilitate access for suppliers to procurement opportunities in the territory of each Party. It is worth mentioning that no specific cooperation activities are included in the CETA chapter on public procurement, nor in the EU-Singapore FTA. This is something that is loosely considered in the EU-Chile AA; however, the EU-Vietnam FTA includes specific commitments like technical and financial assistance in order to develop, establish, and maintain the automatic system for the translation and publication of summary notices in English in Vietnam (Article VI.4). In the same treaty, the Parties recognise their shared interest in cooperating in the promotion of the international liberalisation of government procurement markets, and shall endeavour to cooperate in matters like exchanging experiences and information (such as regulatory frameworks and best practices); developing and expanding the use of electronic means in government procurement systems; building the capability of government officials in best procurement practices; and strengthening institutions for the fulfilment of the public procurement provisions of the FTA (Article XXII).

2.2 Investment

(1) EU-Chile Association Agreement

The EU-Chile AA does not include an investment chapter. Seemingly, this could be explained because, until the entry into force of the Lisbon Treaty, the EU did not have an explicit external competence to negotiate on investment. However, this explanation fails when it is taken into account that the EU-Chile AA is a 'mixed' agreement (see above) where all Member States are Parties and, as result, any topic could

be negotiated and agreed in its framework (either under EC competence or under Member State competence). The main reason for the lack of a chapter on investment must be found in the extreme reluctance by EU Member States to 'put in common' their own separate bilateral investment treaties (BITs).

Although investment is not dealt with *per se* in the EU-Chile FTA, the Agreement deals with it indirectly through different channels. A clause dealing with investment promotion is stipulated in Article 21 and provisions on current payments and capital movements are considered in Articles 163 to 167. Moreover, much more importantly, direct investment in service sectors is covered, under the GATS approach imported by the AA, as Mode 3 of supply of services (commercial presence). In manufacturing sectors, in contrast, the relevant provisions are stated in Chapter III of Part IV, Title III, referring to the right of establishment,[46] which, essentially, considers only national treatment (Articles 132 and 133).

Thus, international rules applicable between the EU and Chile in this field are essentially found in bilateral Agreements of Protection and Promotion of Investments (APPIs) signed between individual EU Member States and Chile during the 1990s.

By the end of the 1980s and early 1990s, many developing countries in Asia, Africa, and Latin America had entered into BITs with the aim of stimulating economic growth through FDI.[47] At the same time, a number of these countries privatised state-owned enterprises, including their energy and utility companies, in order to become an attractive location to potential foreign investors.[48] Chile was a leading country on both processes in Latin America.

Chile's declared purpose for signing BITs was to stimulate effective transfer and mobility of capital and to establish a proper legal framework to regulate both the rights and obligations of the host state and foreign investors.[49] Basic features of most BITs include the scope of coverage (definition of foreign investment and foreign investor), standards of treatment (including MFN clauses, national treatment, fair and equitable treatment, full protection, and security), standards of protection (guarantees and compensation in respect of expropriation, warranties of free transfer of funds, capital, and profits, and subrogation on insurance claims), and dispute settlement provisions (investor-state and state-to-state arbitration).[50]

Although initially BITs were concluded in small numbers between developing and developed countries, usually at the initiative of the latter,[51] this pattern changed with the increasing integration of the world economy and trade liberalisation. In the 1990s, economies in transition and developing countries started signing BITs among themselves and in large numbers.[52] In that context, Chile signed 53 BITs with the aim

[46] ITAQA (n 2) 107.
[47] Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 643-644.
[48] Katia Fach Gómez, 'Latin America and ICSID: David versus Goliath?' (Social Science Research Network 2010) SSRN Scholarly Paper ID 1708325 2 <http://papers.ssrn.com/abstract=1708325> accessed 25 April 2014.
[49] For example, see the ratification process of BITs before the Chilean Congress in Bulletins N° 3761-10 (Iceland), N° 2938-10 (Greece), N° 2682-10 (Honduras), N° 2681-10 (Nicaragua), N° 2683-10 (Guatemala), N° 2639-10 (Peru), N° 2460-10 (Costa Rica), N° 2236-10 (Panama), N° 1820-10 (Cuba), N° 1811-10 (Ukraine), N° 1808-10 (Philippines), N° 1750-10 (Paraguay), N° 1711-10 (Czech Republic), N° 1531-10 (Croatia). República de Chile – Senado, 'Tramitación de Proyectos' (December 2015) <http://www.senado.cl/appsenado/templates/tramitacion/index.php#> accessed 23 December 2015.
[50] See August Reinisch, *Standards of Investment Protection* (OUP Oxford 2008).
[51] Pakistan and Germany signed the first BIT on 25 November 1959. Other European countries soon followed the German example.
[52] See United Nations Conference on Trade and Development, *South-South Cooperation in International Investment Arrangements.* (United Nations 2005).

of promoting and protecting foreign investment. The majority were signed with European and Latin American countries:[53]

Table 1: Chilean BITs with EU Countries

	Country	Date of Signature	Status
1	Austria	8 September 1997	In force since 17 November 2000
2	Belgium/Luxembourg	15 July 1992	In force since 5 August 1999
3	Croatia	28 November 1994	In force since 31 July 1996
4	Czech Republic	24 April 1995	In force since 2 December 1996
5	Denmark	28 May 1993	In force since 30 November 1995
6	Finland	27 May 1993	In force since 14 June 1996
7	France	14 July 1992	In force since 5 December 1994
8	Germany	21 October 1991	In force since 18 June 1999
9	Greece	10 July 1996	In force since 7 March 2003
10	Hungary	10 March 1997	Not in force
11	Italy	8 March 1993	In force since 23 June 1995
12	Netherlands	30 November 1998	Not in force
13	Poland	5 July 1995	In force since 22 September 2000
14	Portugal	28 April 1995	In force since 24 February 1998
15	Romania	4 July 1995	In force since 27 August 1997
16	Spain	10 October 1991	In force since 27 April 1994
17	Sweden	May 24, 1993	In force since 13 February 1996
18	United Kingdom	8 January 1996	In force since 23 June 1997

Chilean BITs closely follow the 'Dutch gold standard model BIT'. Dutch BITs, as characterised by some studies,[54] are short treaties with the following features: broad definitions for investors and investment; unqualified MFN, national treatment, and fair and equitable treatment (FET); free transfer of funds in connection with an investment; no exceptions for special sectors; investor-state arbitration (ISA); no filter mechanisms for taxation measures; and full compensation for direct and indirect expropriation. However, the 'Chilean Model BIT' of 1994[55] has neither provisions on 'full protection and security' (FPS)[56] nor an umbrella clause, and few Chilean BITs have included those.[57]

[53] Information available from Foreign Investment Committee (CIEChile), 'Bilateral Investment Promotion and Protection Agreements (BIPPAS)' (December 2015) <http://www.ciechile.gob.cl/publicaciones/listado-acuerdos-internacionales/acuerdos-promocion-proteccion-inversiones/> accessed 21 December 2015. See also: Rodrigo Polanco Lazo, 'Legal Framework of Foreign Investment in Chile' (2012) 18 Law and Business Review of the Americas 203, 221-222.

[54] Nikos Lavranos, 'The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2241455 1 <http://papers.ssrn.com/abstract=2241455> accessed 15 January 2014.

[55] United Nations Conference on Trade and Development (UNCTAD), 'Chile Model BIT' (*Investment Policy Hub*, 1994) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2841> accessed 7 July 2014.

[56] Every investment chapter of preferential trade agreements (PTAs) signed by Chile includes a provision on the standard of 'Full Protection and Security' (FPS), defined as the requirement to provide the level of police protection required under customary international law. Few BITs include these obligations: with Germany (Art. 4(1)), Argentina (Art. IV (1)), Belgium/Luxembourg (Art. 3(2)), Denmark (Art. 3(1)), France (Art. 5(1)), Greece (Art. 3 (2)), Indonesia (Art. III (2)), Malaysia (Art. 2.2), Netherlands (Art. 3(1)), Tunisia (Art. 3(2)), United Kingdom (Art. 2(2)), and Uruguay (Art. 5(b)).

[57] 'Umbrella clauses' are provisions added to some IIAs that provide additional protection to investors covering investment agreements or contracts that host countries frequently conclude with foreign investors. Katia Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements. Working Papers on International Investment No. 2006/3' 3 <http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jworldit6&section=18> accessed 7 July 2014.

(2) New Generation of EU FTAs

The investment provisions of CETA are found in Chapter 8. As the EU-Korea FTA does not include an investment chapter (maintaining in force existing BITs with EU Member States), and the investment chapters of the EU-Singapore and the EU-Vietnam FTAs are very similar to CETA, this section will compare mainly CETA's agreement with the existing Chilean BITs with EU Member States, considering that according to the European Commission, CETA's investment chapter reflects a 'turning point' in the European approach to investment policy. It is claimed that this is the first agreement that 'puts all EU investors on the same, equal footing' and 'introduces important innovations to investment protection', ensuring a high level of investment protection while preserving the right to regulate and pursue legitimate public policy objectives (such as the protection of health, safety, or the environment). In addition, by the end of 2014, the European Commission has claimed that CETA was the most progressive system established for investor-to-state dispute settlement (ISDS).[58]

Although these affirmations could be contrasted with other equally important innovations found in recent international investment agreements (IIAs) concluded by both Chile and the EU with other countries (as it will be addressed in Section 4 of this report), and one may claim that EU investors will never be on equal footing as long as EU Member State BITs are not terminated, there are certainly several differences between CETA's investment chapter and the BITs previously concluded between Chile and EU Member States:[59]

a) **Scope of application**: To be qualified as an investor, it is necessary that an enterprise have 'substantial business activities' in the territory of the host state.[60] Thus, CETA does not protect 'shell' or 'mailbox' companies.[61] Furthermore, while Chilean BITs with EU Member States are limited to post-establishment protection, CETA also protects 'pre-establishment' (market access), in a way similar to that in NAFTA, as the definition of investor includes a natural person or an enterprise that 'seeks to make, is making, or has made an investment in the territory of the other Party'.[62] However, CETA does not allow ISDS claims based on market access restrictions.[63]

   Chilean BITs with EU Member States include broad definitions of investors, and only a few do not provide such a definition, as the treaty signed with France, Germany, and Netherlands where only the notions of 'nationals' or 'corporations' are defined. In the majority of the treaties, there are specific rules regarding the seat of the investor/place of business of corporations in order to be considered 'investors' or 'nationals', and the BITs signed with Austria, Croatia, Denmark, Finland, Greece, Hungary, Poland, Portugal, Romania, Spain, and Sweden follow the joint criteria of the place of incorporation and the seat of its substantive business. The rest of the treaties only follow the place of incorporation's rule.

Chilean BITs including an umbrella clause are those with Denmark, Greece, Austria, and Netherlands. There are no umbrella clauses in the investment chapters of Chilean PTAs.

[58] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (26 September 2014) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> accessed 1 February 2016.

[59] This section follows the recently 'scrubbed' version of CETA: 'Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union' (*European Commission – Trade*, 29 February 2016) <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> accessed 3 March 2016.

[60] CETA, Art. 8.1.

[61] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 66) 3.

[62] CETA, Art. 8.1.

[63] Peter Fuchs, 'Investment' in Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (eds), *Making Sense of the CETA* (Canadian Centre for Policy Alternatives 2014) 18 <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_INVESTMENT_0.pdf> accessed 3 February 2016.

Chilean BITs with EU Member States traditionally protect only after establishment, and there is no general rule on the duration of the investment. Chilean BITs with EU Member States do not consider general sectoral exclusions from its protection. CETA includes lists of non-conforming measures that are excluded from treaty protection (Article 8.15), and the recognition of each Party's right to regulate within their territories 'to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, or public morals, social or consumer protection, or the promotion and protection of cultural diversity' (Article 8.9).

In the recently agreed text of the EU-Vietnam FTA,[64] as of January 2016, there are important lists of sectors excluded from MFN and national treatment, which include essentially all oil, gas, mining, and infrastructure sectors, and it also includes a consideration of the 'right to regulate' (Article 13bis).

b) **Establishment of investments**: CETA's investment chapter includes provisions that restrict limitations on both market access (Article 8.4) and performance requirements (Article 8.5). This is not found in current Chilean BITs with EU Member States.

c) **Standards of treatment**:

- Most-favoured nation: CETA restricts the scope of the MFN provision to substantive standards, specifically to the treatment no less favourable accorded in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment, and sale or disposal of their investments in its territory.[65] It is explicitly excluded to 'import' and use in the dispute settlement procedures the substantive provisions from other agreements that investors consider are more advantageous to their interests.[66] Both restrictions are not found in existing Chilean BITs with EU Member States.

- Fair and equitable treatment: All Chilean BITs with EU Member States provide that each Party shall accord fair and equitable treatment to investments. However, none define this standard, which has become the most frequent basis for ISDS claims.[67] In contrast, in CETA, there is list of behaviours that amount to a breach of the FET standard, pointing towards not having a 'minimum' standard or an 'evolving concept', but a closed text that defines precisely the standard of treatment. [68] Both the EU and Canada have to agree to review the standard for it to be revisited.

  Although the purpose of this provision is evidently to limit 'unwelcomed' discretion from ISDS arbitrators,[69] its effective implementation will nevertheless be in the hands of those

[64] European Commission – Directorate General for Trade, 'EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 5 February 2016.
[65] CETA, Art. 8.7.
[66] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 66) 3.
[67] United Nations Conference on Trade and Development, *Fair and Equitable Treatment: A Sequel* (United Nations 2012) 10.
[68] According to CETA, Art. 8.9, a Party breaches the obligation of fair and equitable treatment where a measure or series of measures constitutes:
- Denial of justice in criminal, civil, or administrative proceedings;
- Fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings;
- Manifest arbitrariness;
- Targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief;
- Abusive treatment of investors, such as coercion, duress, and harassment; or
- A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties.

[69] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 66) 1-2.

arbitral tribunals. In fact, the same CETA acknowledges that when applying the FET obligation, a tribunal *may* take into account 'whether a Party made a specific representation to an investor to induce a covered investment that created a **legitimate expectation,** and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated'.[70]

d) **Standards of protection**: For the first time in an EU agreement, CETA introduces a definition of what constitutes 'indirect expropriation', which can only occur when the investor is substantially deprived of the fundamental attributes of property, such as the right to use, enjoy, and dispose of its investment. This feature is a first for an EU agreement, but basically continues the US initiative in its agreement with Central America and the Dominican Republic (CAFTA-DR), Annex 10-C (4) (a). A case-by-case analysis is introduced to determine whether an indirect expropriation has taken place. For example, the sole fact that a measure increases costs for investors does not give rise in itself to a finding of expropriation. Similarly, the issuance of compulsory licences in accordance with WTO provisions guaranteeing access to medicines cannot be considered an expropriation. [71] In order to avoid ISDS claims against legitimate public policy, non-discriminatory measures designed and applied to protect health and safety are not considered indirect expropriation, except in the rare cases where they are manifestly excessive in light of their objective.[72]

   In contrast, Chilean BITs with EU Members States do not define indirect expropriation; rather, they simply contemplate the act of expropriating under the term 'expropriation'. However, the treaties with Germany, Italy, and Spain also consider the acts of 'nationalisation', and the BIT with Finland uses the broader notion of 'dispossession'. Most Chilean BITs consider interest paid and resulting from an expropriation as part of the compensation. This is the case of the BITs with Austria, Croatia, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Netherlands, Poland, Portugal, Romania, and the United Kingdom. CETA also considers interest at a normal commercial rate from the date of expropriation until the date of payment.[73]

e) **Investor-state dispute settlement (ISDS)**: Originally, CETA's investment chapter included several provisions to 'improve' investor-state arbitration that are largely not considered in existing Chilean BITs with EU Member States. However, in latest revised or 'scrubbed' version of the agreement (29 February 2016), an important change was made and now the chapter includes the establishment of an investment court for the resolution of disputes between investors and states (CETA Chapter 8, Section F), abandoning the previous system of investor-state arbitration. The EU-Vietnam FTA previously followed the same approach, with a few minor differences that will be explained below. However, the EU-Singapore FTA investment chapter retains the approach of 'improving' investor-state arbitration.

   - Alternative dispute resolution: CETA includes specific provisions on mediation (Article 8.20) and to consultations encouraging an amicable solution (Article 8.19). Although a 'cooling-off' phase is common in Chilean BITs with EU Member States (in a range from three to six months),[74] there are no special rules on mediation.

[70] CETA, Art. 8.9.
[71] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 66) 2.
[72] CETA, Art. 8.11 and Annex 8.11.
[73] CETA, Art. 8.11.
[74] Rodrigo Polanco Lazo (n 61) 136.

- Scope of arbitration: CETA includes several provisions limiting access to ISDS that are not included in Chilean BITs with EU Member States.
    - ***Only specific claims can be brought to arbitration.*** These claims relate to non-discriminatory treatment (CETA Chapter 8, Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment, and sale or disposal of a covered investment) and investment protection (CETA Chapter 8, Section D). In the financial services field, a specific filter mechanism is established to ensure the Parties can take legitimate prudential measures, as also enshrined in the prudential carve-out (CETA, Articles 13.16 and 13.21). Punitive damages are explicitly excluded (CETA, Article 8.39.4). Parties have reaffirmed their right to regulate and the mere fact that laws are modified in a manner which negatively affects an investment or interferes with an investor's expectations does not amount to a breach of an obligation under the treaty (CETA, Article 8.9)
    - ***CETA includes rules to prevent fraudulent or manipulative claims***. An investor may not submit a claim to ISDS when the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process (CETA, Chapter 8, Article 8.18.3).
    - ***CETA introduces statutory limits to bring an ISDS claim***. This limit is of three years, which can be extended if a domestic court proceeding is pursued (two years after the investor exhausts or ceases to pursue claims or proceedings and, in any event, no later than 10 years).[75]
- Regulation of proceedings:
    - ***CETA includes a binding code of conduct for members of the investment tribunal and the appellate tribunal***. This is based on the ethical rules of the International Bar Association (CETA, Article 8.30). There are no similar provisions in Chilean BITs with EU Member States.
    - ***CETA introduces a higher level of transparency of proceedings.*** Following the UN Commission on International Trade Law (UNCITRAL) Rules on Transparency,[76] almost all documents will be made publicly available on a website, including submissions by the Parties and decisions of the tribunal. All hearings will be open to the public, and interested parties (such as non-governmental organisations (NGOs), trade unions, and business associations) will be able to make submissions.[77] There are no similar provisions in Chilean BITs with EU Member States, but several investment chapters of other Chilean FTAs include them.
    - ***CETA explicitly prohibits parallel proceedings***. Investors cannot simultaneously seek remedies in the investment court and under another international agreement. This is in order to avoid divergent awards or overlapping compensation (CETA, Article 8.24). The large majority of the BITs signed by Chile with EU Member States already contained more explicit 'fork-in-the-road' provisions. According to these BITs,

[75] CETA, Art. 8.19.6.
[76] United Nations Commission on International Trade Law (UNCITRAL), 'Rules on Transparency in Treaty-Based Investor-State Arbitration and Arbitration Rules (with New Article 1, Paragraph 4 as Adopted in 2013). UN Doc. A/RES/68/462' <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 14 October 2014.
[77] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 66) 4.

investors must opt either to pursue their claim through the local courts or by means of international arbitration. The only exceptions are contained in the treaties concluded with Austria, Belgium/Luxembourg, Germany, and Netherlands, where if the difference cannot be settled amicably in the referred six months, the dispute will be submitted to competent tribunals of the host state. Only 18 months after that, if there is no final substantial decision and there is still controversy, or if the Parties agree before, the dispute can be submitted to international arbitration.[78]

- ***Expedited system to reject unfounded or frivolous claims***. The arbitral tribunal can quickly dismiss, as preliminary questions, frivolous claims (those 'manifestly without legal merit') and claims without legal basis ('those unfounded as a matter of law'), even before deciding on the merits of the case (CETA Articles 8.32 and 8.33). There are no similar provisions in Chilean BITs with EU Member States.

- ***Losing party pays costs***. Under the large majority of IIAs, there are no clear rules regarding the costs of arbitration (CETA, Article 8. 39.5). This is the first investment treaty with such provisions. It is aimed to prevent a government from bearing all of its costs even if it has successfully defended itself in arbitration.[79]

- ***Appellate tribunal.*** Following a similar provision contained in IIAs concluded by the United States, CETA originally only provided for the possible creation of an appeal mechanism (CETA, Article X.42).[80] There are no similar provisions in Chilean BITs with EU Member States. However, in the recent 'scrubbed' text of CETA, a major change in this issue was included. Now, the treaty in Article 8.28 explicitly establishes an appellate tribunal, which may uphold, modify, or reverse an arbitral tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds set out in Article 52(1) (a) through (e) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) in so far as they are not covered by paragraphs (a) and (b). [81] Another important point in this new draft is that the appellate tribunal may also remand the case to the arbitral tribunal if the CETA Joint Committee adopts a decision regarding the functioning of the appellate tribunal that 'includes and procedures for referring issues back to the tribunal for adjustment of the award' (Article 8.27).[82]

- ***Control by the Parties.*** Also following NAFTA's template, CETA's investment chapter stipulates that the Parties have the right to adopt binding interpretations (through the CETA Joint Commission) and to make submissions when they are not defendants ('non-disputing party submissions').[83] This chapter also states that the arbitral tribunal

[78] Rodrigo Polanco Lazo (n 61) 136.
[79] European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 66) 6.
[80] This is in line with the European Commission's Communication of 2010. European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Towards a Comprehensive European International Investment Policy' (7 July 2010) <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 3 February 2016.
[81] Article 52(1) of the ICSID Convention provides that either party may request annulment of the award on one or more of the following grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.
[82] Simon Lester, 'The New Investment Appellate Court Will Have Remand' (*International Economic Law and Policy Blog*, 2 March 2016) <http://worldtradelaw.typepad.com/> accessed 3 March 2016.
[83] CETA Arts. 8.31 and 8.38.

may only award monetary damages or restitution in property and, therefore, a decision by the tribunal cannot lead to the repeal of a measure adopted by the EU Parliament, a Member State, or Canada (CETA, Article 8.39). This restriction is not found in Chilean BITs with EU Member States. In the recently agreed text of the EU-Vietnam FTA[84] (January 2016), there is a strict rule establishing that arbitral tribunals shall be bound by the interpretations of domestic law given by competent courts and authorities (rather than the 'tribunal shall follow the prevailing interpretation' of CETA Article 8.31).

2.3 Regulatory cooperation

(1) EU-Chile Association Agreement

The EU-Chile AA includes very few provisions on regulatory cooperation, including a general statement on cooperation on standards, technical regulations, and conformity assessment procedures (Article 18), regulatory and policy aspects of telecommunications (Article 37), and regulatory issues in electronic commerce (Article 104).

Article 87 considers certain specific actions to reinforce this type of cooperation through, for example, the exchange of information, experiences, and data, and through scientific and technical cooperation with a view to improving the quality and level of their technical regulations and making efficient use of regulatory resources.

In their bilateral cooperation, the Parties shall aim at identifying which mechanisms or combination of mechanisms are the most appropriate for particular issues or sectors. Such mechanisms include aspects of regulatory cooperation, inter alia convergence and/or equivalence of technical regulations and standards, alignment to international standards, reliance on the supplier's declaration of conformity and use of accreditation to qualify conformity assessment bodies, and mutual recognition agreements.

Based on progress made in their bilateral cooperation, the Parties shall agree on what specific arrangements should be concluded with a view to implementing the mechanisms identified. Some soft commitments are undertaken to 'work towards':

a) Developing common views on good regulatory practices, including, but not limited to:

- Transparency in the preparation, adoption, and application of technical regulations, standards, and conformity assessment procedures;
- Necessity and proportionality of regulatory measures and related conformity assessment procedures, including the use of supplier declarations of conformity;
- Use of international standards as a basis for technical regulations, except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued;
- Enforcement of technical regulations and market surveillance activities; and
- The necessary technical infrastructure, in terms of metrology, standardisation, testing, certification, and accreditation to support technical regulations, and mechanisms and methods for reviewing technical regulations and conformity assessment procedures;

[84] European Commission – Directorate General for Trade, 'EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016' (n 72).

b) Reinforcing regulatory cooperation through, for example, the exchange of information, experiences, and data, and through scientific and technical cooperation with a view to improving the quality and level of technical regulations and making efficient use of regulatory resources;

c) Fostering compatibility and/or equivalence of their respective technical regulations, standards, and conformity assessment procedures;

d) Promoting and encouraging bilateral cooperation between their respective organisations, public or private, responsible for metrology, standardisation, testing, certification, and accreditation;

e) Promoting and encouraging full participation in international standard setting bodies, and reinforcing the role of international standards as a basis for technical regulations; and

f) Increasing their bilateral cooperation in the relevant international organisations and fora dealing with the abovementioned issues.

Chile reports concrete cooperation outcomes only in certain areas: SPS measures; standards, technical regulations, and conformity assessment; customs cooperation and rules of origin; trade in wines; and trade in flavoured spirits. Coincidently, these areas are almost the same as the three side agreements of the treaty.[85]

The EU reports positive advances in the work of the Joint Management Committee on SPS measures; standards, technical regulations, and conformity assessment; custom cooperation and rules of origin; and, notably, on wine and spirits.[86]

(2) The new generation of EU FTAs

CETA features a dedicated chapter on regulatory cooperation (Chapter 21).[87] This is presented as a first among preferential trade agreements (PTAs), as EU FTAs with Korea, Singapore, and Vietnam do not include a chapter on this issue. However, this assertion is not at all accurate. It suffices to recall the agreement on the European Economic Area (EEA), which can be analysed as an agreement 'of' (not 'on') regulatory cooperation; to a lesser degree, this is also the case for the EU's Europe agreements and the EU's agreement with Turkey, in the framework of which a significant amount of 'regulatory cooperation' has taken place.

This new chapter has as goals to 'promote good regulatory practices' and 'reduce differences' through the facilitation of joint initiatives (including, data collection and analysis, regulatory impact analyses, and regulatory proposals, among others), joint high-level dialogue on regulatory matters, and specific sectoral cooperation initiatives dealing with consumer safety. [88]

The chapter starts off by explicitly incorporating by reference relevant WTO provisions, with both Parties affirming their rights and obligations under the TBT and SPS agreements, the General Agreement on Tariffs and Trade (GATT 1994), and GATS, while also committing themselves to ensuring high levels of protection for human, animal, and plant life or health.

[85] Directorate General of International Economic Affairs (DIRECON), 'Evaluación de Las Relaciones Comerciales Entre Chile Y Unión Europea a Diez Años de La Entrada En Vigencia Del Acuerdo de Asociación' (n 3) 10, 14.
[86] ITAQA (n 2) 128-135.
[87] European Commission – Directorate General for Trade, 'Consolidated CETA Text, 26 September 2014' (*TDM Journal (Transnational Dispute Management)*, 26 September 2014) Ch. 26 <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=544> accessed 21 October 2014.
[88] Debra P. Steger, 'CETA – A New Model for Regulatory Cooperation, Transparency and Coherence?' (6 May 2014) <http://slideplayer.com/slide/2411068/> accessed 23 June 2015.

Yet, the limitations on the CETA approach to regulatory convergence become readily apparent in spite of its impressive appearance and the length and the complexity of its provisions. Although the chapter replaces the EC-Canada Framework on Regulatory Cooperation and Transparency,[89] CETA does not entail a change in the nature of regulatory cooperation between both Parties, which remains a voluntary undertaking under which neither Party is obliged to enter into particular regulatory cooperation activities, nor where either Party may refuse to cooperate or withdraw from ongoing cooperation. Additionally, the Parties will engage in regulatory cooperation only if does not limit their ability to carry out their regulatory, legislative, and policy activities.[90] In other words, CETA does not provide the decisive step: harmonising regulation or creating a mechanism to produce 'CETA secondary law' on regulatory standards. Any new 'CETA regulatory provisions' will have to be the object of independent agreements (which could be equally arrived at if CETA did not exist).

Where both CETA Parties will agree to a regulatory cooperation scheme, this has clearly defined objectives, such as: contributing to the protection of human life, health, or safety, animal or plant life or health, and the environment; building trust, deepening mutual understanding of regulatory governance, and obtaining from each other the benefit of expertise and different perspectives; facilitating bilateral trade and investment; and contributing to the improvement of competitiveness and industrial efficiency.[91]

Within the above context, a wide range of regulatory cooperation activities is considered. These include:[92]

a) Preventing and eliminating unnecessary barriers to trade and investment, through ongoing bilateral discussions on regulatory governance;

b) Enhancing the climate for competitiveness and innovation, including through the pursuit of regulatory compatibility, recognition of equivalence, and convergence; and

c) Promoting transparent, efficient, and effective regulatory processes that better support public policy objectives and fulfil the mandates of regulatory bodies, including through the promotion of information exchanges and the enhanced use of best practices.

Whenever practicable and mutually beneficial, the Parties shall endeavour to approach regulatory cooperation in a way that is open to participation by other international trading partners. However, the focus seems to be on substantive convergence, as can be seen from the fact that the Parties may examine opportunities to minimise unnecessary divergences in regulations through means such as conducting concurrent or joint risk assessments and regulatory impact assessments, and achieving harmonised, equivalent, or compatible solutions. The use of mutual recognition is only considered in specific cases.[93]

While CETA does not provide for general regulatory harmonisation with a view to enhancing convergence and compatibility between regulatory measures of the Parties, both sides shall, when appropriate, consider the regulatory measures or initiatives of the other Party on the same or related topics. Although, this consideration does not prevent either Party from adopting differing measures or

[89] Government of Canada – European Commission, 'Framework on Regulatory Cooperation and Transparency' (*Global Affairs Canada – Regional and Bilateral Initiatives*, 31 July 2002) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/eu-framework.aspx?lang=eng> accessed 5 February 2016.
[90] CETA, Art. 21.2.
[91] CETA, Art. 21.3.
[92] CETA, Art. 21.2.3.
[93] CETA, Art. 21.4.(g).

pursuing differing approaches, for reasons that include differing institutional and legislative approaches, circumstances, values, or priorities.[94]

Conversely, CETA makes conformity assessment easier, providing for the mutual recognition of the 'accredited' conformity assessment bodies of Canada and the EU, the acceptance of its test results and product certification, and procedures for requesting the mutual recognition of technical regulations. In order to avoid any misunderstanding, it must be emphasised that this does not mean recognising 'norms' but recognising 'assessments of conformity to the norms applicable in Party A by a body of country B'; therefore, it is much more an issue of 'trade facilitation' than an issue of 'regulatory convergence'.

CETA deals with this topic in Chapter 21 on regulatory cooperation, in the special Protocol on the Mutual Acceptance of the Results of Conformity Assessment, and in the Protocol on the Mutual Recognition of the Compliance and Enforcement Program regarding Good Manufacturing Practices (GMP) for Pharmaceutical Products. However, it bears noting that beyond pharmaceutical products, the current list of products that stands to benefit from the above mutual acceptance procedure is rather limited[95] – although there is a list of priority categories of goods for future consideration.[96] The Protocol also features several exclusions, notably where a Party has delegated exclusive authority to a single non-governmental body to assess the conformity of goods with that Party's technical regulations; in regard to purchasing specifications prepared by a governmental body for production or consumption requirements of that body; for SPS measures; [97] for certain activities performed by bodies on behalf of market or post-market surveillance; for agricultural products; and for the assessment of aviation safety, as well as the statutory inspection and certification of vessels other than recreational craft.[98]

Another CETA chapter provides a framework to facilitate mutual recognition agreements (MRAs) for professional qualifications.[99] For these purposes, a joint committee responsible for the implementation of that mechanism will be established after the entry into force of the agreement, and a set of non-binding guidelines for MRAs on professional qualifications have been included in the treaty. The EU foresees early advances in specific areas of architecture and engineering services.[100]

CETA also creates a forum for cooperation between regulators. The Regulatory Cooperation Forum (RCF) shall be established to facilitate and promote regulatory cooperation, providing a setting for discussion of regulatory policy issues of mutual interest to the Parties, assisting individual regulators in identifying

[94] CETA, Art. 21.5.
[95] Product coverage currently includes: electrical and electronic equipment, including electrical installations and appliances and related components; radio and telecommunications terminal equipment; electromagnetic compatibility (EMC); toys; construction products; machinery, including parts, components, including safety components, interchangeable equipment, and assemblies of machines; measuring instruments; hot-water boilers, including related appliances; equipment, machines, apparatus, devices, control components, protection systems, safety devices, controlling devices, and regulating devices, and related instrumentation, and prevention and detection systems for use in potentially explosive atmospheres (ATEX equipment); equipment for use outdoors as it relates to noise emission in the environment; and recreational craft, including components.
[96] This list includes: medical devices, including accessories; pressure equipment, including vessels, piping, accessories, and assemblies; appliances burning gaseous fuels, including related fittings; personal protective equipment; rail systems, subsystems, and interoperability constituents; and equipment placed on board of a ship.
[97] However, CETA Ch. 5 on SPS measures provides a framework for cooperation on the full scope of animal health, plant health, and food safety, proactively determining the equivalency of each other's inspection and certification systems, if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection. Annex V of this chapter sets out several areas where this is already recognised, updating the Canada-EU Veterinary Agreement. Finally, an SPS Committee is established to discuss issues before they become problems. See Debra P. Steger (n 99).
[98] CETA, Protocol on the Mutual Acceptance of the Results of Conformity Assessment, Art. 1.5.
[99] CETA, Chapter 11, Mutual Recognition of Professional Qualifications.
[100] Cecilia Malmström, 'Trade in the 21st Century: The Challenge of Regulatory Convergence' (*European Commission – Trade*, 19 March 2015) 4 <http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153260.pdf> accessed 22 June 2015.

potential partners for cooperation activities, reviewing regulatory initiatives, and, in general, encouraging the development of bilateral cooperation activities.[101]

Besides this institutional dimension, the chapter sets up tools for dialogue by standard-setting agencies and government officials in a host of regulatory areas. Further cooperation of the Parties is also considered, especially with respect to the monitoring of forthcoming regulatory projects and the identification of opportunities for regulatory cooperation. For that purpose, both Parties shall periodically exchange information on ongoing or planned regulatory projects in their areas of responsibility. However, cooperation seems to be restricted or even foreclosed in certain areas such as food safety, which is explicitly excluded from voluntary activities of cooperation and information sharing.[102]

In seeking civil society perspectives on the implementation of the CETA, the Parties are allowed to consult, jointly or separately, with relevant stakeholders and interested parties, including representatives from academia, think tanks, NGOs, and business, consumer, and other organisations by any means they deem appropriate.[103]

2.4 Sustainable development and other related issues

(1) EU-Chile Association Agreement

There is no separate chapter on sustainable development in the EU-Chile AA, and environmental and labour issues are only mentioned in the articles on cooperation (as said, they are empty of any effective content as they do not impose any legal obligation and are not, and cannot be, a 'legal basis' for EU activities).[104]

The EU-Chile AA includes an article identifying topics of cooperation on the environment[105] and a dedicated provision on social cooperation with reference to International Labour Organization (ILO) Conventions,[106] and considers sustainable development and environmental protection as general objectives in its respective preambles. The AA does not consider obligations to enforce labour or environmental legislation, commitments to implement international instruments (like multilateral environmental agreements (MEAs) or ILO Conventions), or the promotion of good practices in either area, such as corporate social responsibility (CSR) or sustainability assurance schemes. This situation is in stark contrast to the obligations of both the EU and Chile in comparable agreements with other trading partners.

According to some of the interviews conducted for this research, the activities of cooperation on environmental issues between the EU and Chile are largely unknown by Chilean civil society.

[101] According to CETA, Ch. 26, Art. 6, the RCF shall be co-chaired by a senior representative of the Government of Canada at the level of a Deputy Minister, equivalent or designate, and a senior representative of the European Commission at the level of a Director General, equivalent or designate, and shall comprise relevant officials of each Party.
[102] CETA, Ch. 26, Art. 7.
[103] CETA, Ch. 26, Art. 8.
[104] See also Ramón Torrent, 'Las Relaciones Unión Europea-América Latina En Los Últimos Diez Años' (n 13).
[105] Chile-EU AA, Art. 28, encourages 'conservation and improvement of the environment, prevention of contamination and degradation of natural resources and ecosystems, and rational use of the latter in the interests of sustainable development'.
[106] Chile-EU AA, Art. 44. 'The Parties recognise the importance of social development, which must go hand in hand with economic development. They will give priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant ILO Conventions covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour, and equal treatment between men and women'.

(2) The new generation of EU FTAs

Sustainable development is significantly developed in CETA, with a dedicated chapter on trade and sustainable development (Chapter 22). The relation of trade to labour and to the environment are also the subject of separate chapters (Chapters 23 and 24, respectively). These provisions mostly follow the evolution of current EU FTAs with explicit references to international and multilateral commitments.[107] These chapters take much of the structure and language of the 2012 agreement that the EU concluded with Colombia and Peru.[108]

a) Sustainable development: The Parties stress the importance of ensuring transparency as a necessary element to promote public participation and information on sustainable development. The Parties also emphasise dialogue and consultations with each other regarding trade-related sustainable development issues of common interest. At the same time, voluntary best practices of CSR by enterprises are encouraged, such as those embodied in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multilateral Enterprises, to strengthen coherence between economic, social, and environmental objectives.[109]

   In that context, CETA creates two distinct pieces of institutional infrastructure to foster transparency, cooperation, and engagement with stakeholders: (i) an as-yet unnamed body, composed of high-level officials that will meet on an ad hoc basis to review the implementation of the sustainable development, environment, and labour chapters; and (ii) a 'Civil Society Forum' that will meet annually to discuss the sustainable development aspects of the agreement. This is complemented with a self-review and monitor mechanism or even joint assessments to evaluate the impact of CETA's implementation on sustainable development in each territory.[110]

b) Environment: The Parties recognise that the environment is a fundamental pillar of sustainable development and that trade could contribute to sustainable development.[111] At the same time, there is recognition of the right of each Party to set its own environmental priorities and to establish its own domestic levels of environmental protection, and exceptions are given to protect human, animal, or plant life or health, similar to those in GATT and GATS. However, when preparing and implementing measures aimed at environmental protection that may affect trade or investment between the Parties, each Party shall take into account relevant scientific and technical information, and related international standards, guidelines, or recommendations.[112]

   Currently, CETA includes fairly standard references to international treaties and principles,[113] including collaboration on the implementation of MEAs (Article 24.4), cooperation on environmental issues, in general, and in specific areas of forest products (Article 24.10) and fisheries (Article 24.11), and an elaboration on the precautionary principle – but without using

[107] Lina Lorenzoni Escobar, 'Sustainable Development and International Investment: A Legal Analysis of the EU's Policy from FTAs to CETA' (2015) 136 Beiträge zum Transnationalen Wirtschaftsrecht, Heft 46 <http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20136.pdf> accessed 3 February 2016.
[108] Aaron Cosbey, 'Inside CETA: Unpacking the EU-Canada Free Trade Deal' (*International Centre for Trade and Sustainable Development*, 3 November 2014) <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal> accessed 3 February 2016.
[109] CETA, Art. 22.3.
[110] Aaron Cosbey (n 119).
[111] CETA Articles 22.1, 22.3, and 24.9.
[112] CETA, Art. 24.8.1.
[113] Examples include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Rio Declaration on Environment and Development of 1992, Agenda 21 on Environment and Development, and the Johannesburg Declaration and Plan of Implementation of 2002 on Sustainable Development.

that name (Article 24.8). Certain provisions are particularly noteworthy because of their relative novelty in the context of trade agreements:

- Rights and obligations relating to water are included in the text, like the recognition that each Party has the right to protect and preserve its natural water resources, and that water in its natural state is not a good or a product and outside the scope of the agreement (Chapter 1, Article 1.9);
- Measures seeking to ensure the conservation and protection of natural resources and the environment, including limitations on the availability, number, and scope of concessions granted, and the imposition of moratoria or bans are considered allowed market access restrictions (Chapter 8, Article 8.4.2); and
- The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in domestic environmental laws (Chapter 24, Article 24.5). In contrast to the obligations in the trade and environment chapter that are best-effort pledges, the commitment not to lower environmental standards is explicitly binding ('shall not').

c) Labour: Recognising the right of each Party to set its labour priorities and to establish its levels of labour protection, CETA includes fairly standard obligations in the sense that domestic law should respect ILO core principles and that the Parties should promote the objectives of the decent work agenda.[114] However, it is noteworthy that there is no mention of indigenous peoples or a human rights and restrictive actions clause.[115]

Similar to the trade and environment chapter, there is a binding commitment of the parties to recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection embodied in domestic labour law and standards.[116]

These commitments do not impose new obligations on the Parties beyond their existing international obligations, nor are disagreements between the Parties on the implementation of the trade and environment or the trade and labour chapters subject to the normal CETA dispute settlement procedures. Regarding these issues, the Parties have recourse to special rules and procedures that include governmental consultations and the composition of a panel of experts that can issue a non-binding report on whether there is a breach of these commitments. In contrast to NAFTA's environmental side agreement, where the procedure to assess whether a contracting state has failed to effectively enforce its environmental law can be initiated by civil society (NGOs or enterprises), CETA procedures in this area can only be triggered by governments. However, as in NAFTA, in practice, sanctions are limited to 'naming and shaming'.[117] Implementing the recommendations of a panel of experts that determines that there has been non-conformity with the trade and environment or the trade and labour chapter is ultimately left to the mutual agreements of the Parties.[118]

In contrast to CETA, the EU FTAs with Korea, Singapore, and Vietnam consider more complete sustainable development provisions, comprised of one chapter devoted to trade and sustainable development (Chapter 13 in the agreements with Korea and Singapore and Chapter 15 in the agreement with

[114] 2006 Ministerial declaration of the UN Economic and Social Council on Full Employment and Decent Work, and the 2008 ILO Declaration on Social Justice for a Fair Globalisation.
[115] Lina Lorenzoni Escobar (n 118) 46.
[116] CETA, Art. 23.4.
[117] Aaron Cosbey (n 119).
[118] CETA Ch. 23, Arts. 23.9-23.11, and CETA Ch. 24, Arts. 24.14-24.16.

Vietnam). The EU-Korea FTA (2009) was the first treaty that reflects the new approach of the EU towards linking sustainable development clauses to trade.[119]

In these chapters, besides reaffirming the commitment of the Parties to implement the multilateral labour standards and agreements (essentially the ILO Conventions)[120] and MEAs to which they are party,[121] the Parties recognise their right to establish their own levels of environmental and labour protection and their commitment not to weaken or lower them in the application and enforcement of laws, regulations, or standards.[122]

Activities of cooperation on trade-related aspects of social and environmental policies are considered in all these chapters. Additionally, the Parties commit to facilitate and promote trade and investment that contribute to sustainable development, including for goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability; environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services; and eco-labelled goods.[123] The agreements with Korea and Vietnam also create institutional mechanisms to implement its provisions, establishing a Trade and Sustainable Development Committee, a Domestic Advisory Group on sustainable development, and a Civil Society Forum on these issues.[124] A different institutional setting is conceived in the agreement with Singapore, which establishes a Board on Trade and Sustainable Development as a monitoring mechanism.[125] These three agreements consider a separate and non-binding dispute settlement mechanism to examine issues that arise in its implementation that considers the appointment of a panel of experts when neither the treaty bodies nor interstate consultations have been successful.[126]

The EU-Singapore FTA also includes special provisions on trade in timber and timber products (Article 13.7), as well as in fish products (Article 13.8), which contain sections against illegal timber and fishing. On the other hand, Chapter 15 of the EU-Vietnam FTA contains provisions on climate change (Article 5), biological diversity (Article 6), sustainable forest management, and trade in forest, living marine resources, and aquaculture products (Articles 7 and 8).

Some of the persons interviewed for this report from the Chilean side consider that civil society and workers would favour an approach on sustainable development more similar to the one considered in the EU FTAs with Korea, Singapore, and Vietnam. However, for them, maintaining the current EU perspective has the benefit of minimising Chilean exposure to dispute settlement for breach of labour commitments, as has occurred with Guatemala in the framework of the CAFTA-DR with the United States.[127] Additionally, in their view, EU companies in Chile tend to 'import' better wages and work conditions more than lowering labour rights.

Information received about the effective use of labour and environmental cooperation in the framework of the EU-Chile AA is somehow mixed. While certain business representatives and some public officials mention that it has worked quite well, promoting good practices and technical aid in certain projects,

[119] Susan Ariel Aronson, 'Human Rights' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank Publications 2011) 454.
[120] EU-Korea FTA, Art. 13.4, EU-Singapore FTA, 13.3, EU-Vietnam FTA, Ch. 15, Art. 3.
[121] EU-Korea FTA, Art. 13.5, EU-Singapore FTA, 13.5, EU-Vietnam FTA, Ch. 15, Art. 4.
[122] EU-Korea FTA, Arts. 13.3 and 13.7, EU-Singapore FTA, Arts. 13.2 and 13.12, EU-Vietnam FTA, Ch. 15, Arts. 2 and 10.
[123] EU-Korea FTA, Art. 13.6, EU-Singapore FTA, 13.11, EU-Vietnam FTA, Ch. 15, Art. 9.
[124] EU-Korea FTA, Arts. 13.12 and 13.13, EU-Vietnam FTA, Ch. 15, Art. 15.
[125] EU-Singapore FTA Art. 13.15.
[126] EU-Korea FTA, Art. 13.15 and 13.16, EU-Singapore FTA, Arts. 13.16 and 13.17, EU-Vietnam FTA, Ch. 15, Arts. 16 and 17.
[127] Office Of United States Trade Representative, 'In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR' (1 July 2015) <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr> accessed 3 March 2016.

certain sectors of the civil society – particularly some NGOs and members of academia – do not have a clear understanding of its use and concrete results. In that context, they see an update or renegotiation of the AA as an opportunity to incorporate within their objectives a greater focus on environmental issues and global public goods, such as biodiversity, climate change, and deforestation. For them, special attention should be given to the issue of climate change as the most pressing issue of the global environmental agenda, but which is absent from the AA. In this regard, Chile would benefit especially from technical and financial support for adaptation measures, as one of the highly vulnerable countries to climate change. Most international cooperation programs implemented in Chile are related to mitigation measures and the implementation of clean renewable energy.

2.5 Other areas where the level of ambition of the existing EU-Chile Association Agreement can be increased

Article 2 of the EU-Chile AA included geographical indications (GIs) in the protection of intellectual property rights (IPRs), especially for the wine industry. The AA follows the definition of Article 22(1) of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which protects GIs under the laws and regulations of a Party for identifying a wine originating in a region or locality within that Party. The Agreement on Trade in Wines (ATW), referred to in Article 90 of the AA, specifically deals with the mutual protection of GIs of names for wine (ATW Title I).

The ATW stipulates that Parties shall take all necessary steps to ensure the mutual and effective protection of the GIs of wines originating in the EU (listed in Appendix I) and Chile (listed in Appendix II), and prevent GIs from being used to describe wine not covered by the indications or descriptions concerned (Article 6). In that line, the registration of a trademark for wine that is identical or similar to, or contains a protected GI, shall be refused (Article 7).

Traditional expressions or complementary wine quality mentions are also protected for the EU (Appendix III) and Chile (Appendix IV). Similarly to GIs, the registration of a trademark for wine which is identical or similar to, or contains a traditional expression or a complementary quality mention of the other Party, shall be refused unless that registration concerns the use of that traditional expression or complementary quality mention to describe or present the category or categories of wine for which that traditional expression or complementary quality mention is listed (Articles 8-10). ATW deals with the recognition and introduction of new oenological practices (Title II), import certification requirements (Title III), SPS measures (Title IV), and mutual assistance between control authorities (Title V). A joint committee consisting of representatives of the Parties is established to oversee the proper functioning of the AA and to examine all issues that may arise in its implementation.

According to representatives of the Chilean wine sector interviewed for this report, two situations have hampered the implementation of the ATW with the EU:

1) **The approval of designations of origin and geographical indications**. There is a delay in approving Chilean requests of protection in the EU of around three to four years, and a more expeditious way to accept these changes is needed.

2) **Oenological practices and processes.** Before 2008, the EU had standards that are more stringent on the subject of oenological practices and only accepted those included in a positive list. Although with respect to Chilean winemakers, the EU now accepts those recognised by the International Organisation for Vine and Wine (OIV), further steps to reduce red tape in this field can be undertaken (e.g. through MRAs, a mechanism extensively used by the rest of the world).

Regarding GIs, it is important to highlight that Chile – in contract to EU Member States – is not a contracting party to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.

2.6 Summary of the comparison

As described in this section, after comparing the EU-Chile AA with recent EU trade agreements, the current treaty could be improved in several areas. While some of the possible enhancements would be the product of the evolution of trade disciplines and the need to adapt its text to current developments, such as in the case of sustainable development (where the existing AA framework is at a minimum when compared with other EU and Chilean trade agreements) and government procurement (besides recent EU practice in this area (i.e. deepening procurement commitments), an updated GPA is in force since 2015). In the same line, other parts of treaty could be adapted to reflect the concerns voiced by the private sector on certain aspects of its application (e.g. the Agreement on Trade in Wines).

Other areas of the AA could also be improved, because at the time of its conclusion, the EC did not have competence in the negotiation of these agreements. This is certainly the case regarding investment, beyond the necessary update required for Chilean BITs with European countries that were signed in the 1990s, the texts of which do not reflect current concerns about investment protection and investor-state dispute settlement. In other cases, certain novel fields, such as regulatory cooperation, were not included in the original AA, merely because its existence as a separate discipline in trade agreements was not considered until the negotiations of CETA and the Trans-Pacific Partnership (TPP).

It must be noted the reinforcement of international regulatory cooperation, the promotion of a new approach on investment protection including and investment court system, and the inclusion of sustainable development provisions into trade agreements in order to promote social and environmental pillars, are issues that fit in the new EU 'trade for all' strategy of October 2015.[128]

[128] European Commission and Directorate-General for Trade, *Trade for All: Towards a More Responsible Trade and Investment Policy.* (Publications Office 2015) 13, 21, 23 <http://bookshop.europa.eu/uri?target=EUB:NOTICE:NG0115586:EN:HTML> accessed 9 May 2016.

3 Real needs and expectations

The comparison in the previous section proves that there are many areas of the EU-Chile AA that can be modernised or updated. However, this possibility must be checked against the real needs and expectations of both Chile and the EU concerning this modernisation: must this modernisation reach the level of the more recent set of bilateral agreements negotiated by the EU? Or, alternatively, is reaching the level of this new set of agreements sufficient to fill these needs and expectations?

3.1 Existing trade and investment flows between the EU and Chile[129]

The table below presents the existing trade and investment flows between the EU and Chile, and makes a tentative projection on future flows, based on publicly available information.

The trade data for the period 2002-2014 are from Eurostat. The trade data for the period 2015-2017 have been extrapolated using the year-to-year growth rates from OECD data on the total volume of imports of Chile (for exports) and the total volume of imports of the median of EU Member States (for imports), assuming a constant weight of bilateral trade flows.

FDI data for the period 2013-2014 have been extrapolated using the year-to-year growth rates from OECD data on total FDI outward of the sum of EU Member States (for FDI outward) and total FDI outward of Chile (for FDI inward), assuming a constant weight of bilateral FDI flows.

FDI data for the period 2015-2017 have been extrapolated using a finite exponential weighted moving average (EWMA) with weights of 0.706, 0.212, 0.064, for lags 1, 2, and 3, respectively.

Exports to Chile were growing until 2013. This was driven by the real growth of income in Chile. Only in 2009 and 2014 did the growth path reverse, and this was a consequence of the negative growth rate of Chile in 2009 and the slower but positive growth rate that Chile experienced from 2013 onwards.

Imports from Chile were affected by the recession in the EU and, thus, there is a sizeable increase in the series until the beginning of the financial crisis in EU in 2009. From 2009 to 2011, imports returned to a path of positive growth, but because of economic and fiscal recession in the EU, imports have diminished since 2011.

The net balance of trade flows in the table indicate that there is a slight structural deficit in the current account between the EU and Chile. However, we should highlight that export and import flows are driven by different factors. Among other factors, exports to Chile are driven by the income of Chile, whereas imports are driven by income developments in EU Member States. Therefore, given the different sizes of both economies, the external deficit of the EU is not so remarkable.

FDI flows have been more volatile. FDI outflows have grown during the period under consideration. Investors are specifically attracted by Chile's natural resources and its highly developed infrastructure, and, more generally, by the macroeconomic stability and low risk of Chile and its growth outlook. Related to this, FDI flows to Chile are correlated to the economic performance of Chile, and, thus, it can be understood how FDI outward flows decreased during 2005-2009.

[129] This section was developed with the help of by Dr Octavio Fernández-Amador, Post Doc researcher and lecturer in economics, WTI.

	Table 2: Trade and FDI Relationships: EU[130] and Chile			
Year	Exports of Goods and Services	Imports of Goods and Services	FDI Outward	FDI Inward
	(Million ECU/EUR)	(Million ECU/EUR)	(Million ECU/EUR)	(Million ECU/EUR)
2002	3,172	4,913	1,564	2,138
2003	2,963	5,004	1,643	-295
2004	3,121	7,357	1,987	23
2005	3,919	8,158	889	-26
2006	4,280	12,482	997	200
2007	4,768	12,575	733	1,122
2008	5,055	11,313	1,258	608
2009	4,527	7,536	308	-699
2010	6,036	9,476	1,939	676
2011	7,654	11,097	1,791	1,004
2012	8,490	9,690	3,086	280
2013	9,282	8,946	3,315 extrapolated: see text	150 extrapolated: see text
2014	7,389	8,694	3,394 extrapolated: see text	178 extrapolated: see text
2015	7,146 extrapolated: see text	9,126 extrapolated: see text	3,327 extrapolated: see text	195 extrapolated: see text
2016	7,285 extrapolated: see text	9,489 extrapolated: see text	3,336 extrapolated: see text	190 extrapolated: see text
2017	7,569 extrapolated: see text	9,971 extrapolated: see text	3,337 extrapolated: see text	189 extrapolated: see text
Sources: Eurostat, OECD, and own calculations.				

3.2 Needs and expectations

(1) The overall perception of the need for the modernisation

The EU and Chile are considering updating their AA to take into account the economic and political developments over the last 15 years. It could be argued that most of the reasons for the modernisation of the Global Agreement with Mexico apply also to the updating of the AA with Chile. In the parallel study

[130] EU definition changes over time: EU-15 until 2000, EU-25 until 2003, EU-27 until 2007, and EU-28 from 2013.

on Mexico commissioned to the authors by the EP, these reasons are formulated as follows (leaving aside the changes in the Mexican economy, which have not occurred in the Chilean case):

a) **The EU has changed.** The EU's trade policy has changed following the Lisbon Treaty due to natural changes derived from the EU's enlargement and due to deep crises regarding the integration process and political challenges on all fronts. The EU has also been affected by the economic crisis, and the revision of its agricultural policy facilitates a process of trade liberalisation that seemed impossible in 2000. This makes trade policy even more important than before, something that is reflected in the EU's new generation trade agreements, which differ substantially from older ones, as has been explained throughout this study.

b) **The global economy has changed**. It has become much more complex. Global value chains (GVCs), and the consequent much greater interdependence of goods and services, create a new panorama for international trade and its legal and institutional frameworks. An OECD study has concluded that Chile is highly engaged in GVCs, primarily as a producer of inputs for production in other economies (such as copper and other natural resources). Chile's challenge in this regard is to increase its export diversification, something that should be at the forefront of the negotiations to update its AA with the EU.[131] Regarding the EU, concerns have arisen as to whether it will be able to maintain its strong position in regards to GVCs and keep pace with the changing global environment. [132]

c) **Geopolitics and geo-economics have also radically changed**. The shifting towards the Pacific of economic centres of gravity puts pressure on the EU to adapt to this new scenario. This shifting modifies the role of Chile, which becomes not only a Latin American country, with excellent relations with North America, but also an active player in the Pacific area, with other Latin American countries as well as non-American countries in the framework of the Pacific Alliance. In short, the negotiation of several preferential trade agreements with countries of the Pacific Rim and of the Latin American region provides more incentives to trade with those regions in the absence of any update by the EU. Due to the extensive experience of Chilean trade negotiators, it is unlikely to expect that Chile is unaware of its changing role, and this circumstance should be kept in mind in the preparation of the negotiations of an update of the AA with the EU.

Two additional changes must be added:

a) **Doha Round**. It is generally acknowledged that the Doha development round has stalled. Furthermore, the very limited and partial results achieved by the WTO Ministerial Conferences in Bali (2013) and Nairobi (2015), and in particular, the latter concerning the elimination of export subsidies, require a revision of the existing situation. Although the EU and Chile have been supporters of the Doha round, this reality should inform their international trade policy.

b) **Brazil**. The perception and the likely reality of the serious decline of Brazil's role as the leading Latin American country enhances the roles not only of Mexico,[133] but of all other Latin American countries, including Chile, at least in certain products such as high-quality wines and fruits.[134]

[131] Organisation for Economic Cooperation and Development (OECD), 'Diagnostic of Chile's Engagement in Global Value Chains' (2015) <https://www.oecd.org/chile/diagnostic-chile-gvc-2015.pdf> accessed 22 April 2016.
[132] European Commission, 'Has the EU's Leading Position in Global Trade Changed since the Crisis?' (2015) 39 ECFIN Economic Brief <http://ec.europa.eu/economy_finance/publications/economic_briefs/2015/pdf/eb39_en.pdf> accessed 22 April 2016.
[133] Patrick Gillespie, 'Mexico Is Latin America's Success Story as Brazil Stumbles' (*CNNMoney*, 23 September 2015) <http://money.cnn.com/2015/09/23/investing/mexico-brazil-latin-america-economies/index.html> accessed 22 April 2016.
[134] Wharton / University of Pennsylvania, 'Latin America in 2016: Will Weak Exports Dampen Growth?' (*Knowledge@Wharton*) <http://knowledge.wharton.upenn.edu/article/latin-america-in-2016-will-weak-exports-and-brazils-instability-dampen-

However, the authors reflect that, in fact, these are not the reasons behind the opening of new negotiations with Chile. Off the record, most EU experts interviewed for this paper saw the updating of the Chile agreement simply as a 'goodwill measure' that such a good and reliable partner as Chile 'deserves' – if there is an improvement in relations with Mexico. The authors agree with this view. From the Chilean side, interviewees mentioned the need to 'update' the current agreement, to catch up with the new developments in trade and investment disciplines. Chilean negotiators are well aware of these developments due to the extensive number of preferential trade agreements negotiated by Chile, including mega-regional trade agreements like the TPP.

Nevertheless, the authors would argue that internal consideration from the EU alone could also be used to justify the modernisation of the AA with Chile. As already explained, the 2002 AA with Chile imported the GATS approach to services simply for legal and institutional reasons: to use the new competence on 'trade in services' (a GATS invented notion) included by the Treaty of Nice within the scope of the EU's Commercial Policy. Under the 'trade in services' notion, foreign direct investment was considered 'trade' ('commercial presence' or GATS Mode 3 of supply of services), and this created the need to redefine the scope of the chapter on 'establishment' in order to exclude from it establishment in the services sectors.[135] This extremely tortuous approach is no longer needed after the entry into force of the Lisbon Treaty, which has also explicitly included foreign direct investment within the scope of the EU's Commercial Policy. This issue will be discussed more in detail in the next section (Section 5).

(2) Sectorial economic motivations and the possible new content of the modernised agreements

While there seems to be a sort of consensus on the opportunity (much more than the 'need') to modernise the present legal and institutional trade framework between the EU and Chile, there is much less clarity on its specific economic and trade content.

In the business sector of the EU, it is difficult to find a clear and articulate view regarding what content should be included in an updated AA; although, there is a certain perception that the present agreement has not worked badly and has not raised further 'problems to be solved' (as is also the case with the modernisation of the AA with Mexico). Most arguments about the modernisation of the AA with Chile turn around very generic considerations about trade and investment liberalisation, the convenience of 'ambitious' (or not so ambitious) agreements, and the convenience to not leave Chile 'behind' Mexico if, after its modernisation, the agreement with Mexico becomes more ambitious that the existing one with Chile.

The same sentiment is also found on the Chilean side, where the private sector has been fully absorbed by developments in the Pacific Rim (the Pacific Alliance, between Mexico, Chile, Colombia, and Peru, with negotiations on an investment and trade protocol finalised in February 2014, and the broader TPP, with negotiations just finalised at the end of 2015). However, at least at the governmental level, there is an impression that an update is fully justified, considering that it has been nearly 15 years since the AA was negotiated, and that in recent years, several concepts and themes that served as a basis for negotiation have been reformulated, not only in the commercial sphere but also in other areas covered by the AA. In addition, the policies of the EU and Chile in some aspects have also changed. Chilean expectations are situated in the three areas of the agreement. In trade, the goal would be to overcome some of the market restrictions that could not be resolved in the previous negotiations, especially in the fisheries sector and

growth/> accessed 22 April 2016.

[135] *Article 130* **Scope** This Chapter shall apply to establishment in all sectors with the exception of all services sectors, including the financial services sector.

in the sectors of certain agricultural products. In addition, another goal would be a review of the provisions of the SPS measures, even though it is considered that they have worked relatively well.

In terms of cooperation, it is essential to adapt the instrument to this new context, implementing real changes in the relationship between Parties, leading to the adoption of new instruments that are more in line with the current reality of relations between Chile and the EU, pointing, for example, to productive cooperation, science, technology, and academic exchanges, among others. Additionally, in political and institutional matters, new instruments to strengthen dialogue and coordination are deemed requisite, along with their extension the area of international security.

Therefore, for the time being, the agenda is clearly in the hands of officials on both sides. It should always be recalled that, for trade negotiating purposes, the 'interests in presence' are not the same as 'the economic interests in trade relations'. Indeed, most of these interests may already be well served by the existing arrangements and do not require modification or modernisation. This is particularly relevant in the case of open economies like that of the EU and Chile. Hence, what matters for the negotiations are the specific problems that must be solved through the course of the negotiations that may be of relatively minor economic importance. This will certainly be the case with the modernisation of an agreement as ambitious as the 2002 AA. Chile is not waiting for the EU to propose an update of the AA in order to enhance and deepen its international trade policy. Chile is already intensively working in this area, being one of the most active players in negotiating updates of preferential trade agreements. We must recall that the recently concluded TPP Agreement, in its origin, started as an update and enlargement of the Pacific 4 (P4) 4 Agreement between Chile, Brunei, New Zealand, and Singapore.

A great summary on the scope of the modernisation was given by one of the persons interviewed from Chile:

> *A comprehensive review of the three areas of the agreement should be made. In trade, some restrictions remain, which are explained by the context in which the negotiation took place, as in the fisheries sector, for example. It also opens the possibility of discussing the protection of agricultural products from specific geographical origins. In economic matters, progress can perhaps be made in the adoption of a new agreement on investment, which at some point may replace the current bilateral investment agreements with EU Member States, which do not consider current basic principles, like corporate responsibility. On cooperation, it is necessary to redefine the relationship between Chile and the EU, considering that Chile has achieved a greater relative development in recent years. However, this should not affect several areas of cooperation that are of interest to both parties and which can be assimilated to the relations the EU maintain on that realm with a level of development similar to Chile.*

(3) A new model of agreement?

As mentioned above, the main drivers of the modernisation process, at least now, are not specific problems or interests, but rather very broad considerations of geopolitics and geo-economics and the idea of 'equity' between the EU's Latin American partners. This notion is not surprising. However, if this is the case, then it is convenient, and even necessary, to look at the broad nature and content of the modernisation process of the present set of agreements and decisions. The following questions should be addressed:

a) **Should this modernisation constitute the occasion for the design of a new type of EU agreement with third countries (or, at least, with key third countries)?** Or, on the contrary, should it constitute a simple copying and pasting of previous EU bilateral agreements (perhaps the more recent ones)?

In the case of Chile, the third option, as discussed by the authors regarding the case of Mexico, of whether a 'new' agreement is necessary or it suffices to enact, as in 2000 and 2001, new Decisions of the Joint Council set up by the 1997 Global Agreement, does not exist. This third option is not possible because the new 2002 AA with Chile was a 'new' agreement that replaced the former 1996 agreement, and not a set of Joint Council Decisions adopted within the previous 1996 agreement. However, a different third option appears for Chile:

b) **Should a new 'horizontal agreement' replace the former 2002 AA or, simply, should changes and additions be introduced into it (which would make the modernisation much simpler and economical in terms of time and effort)?**

The option of **not** following the easy and speedy path (i.e. a partial modification of the existing AA) **and not** considering an ambitious new model of agreement, but rather relying on previous precedents, seems to lack a rationale other than that of applying 'templates', which means copying and pasting texts that have been developed for other contexts (historical, geographical, or institutional) – a technique that is too often present in international negotiations.

Furthermore, compared to the United States, the EU has a great disadvantage when following this strategy of 'copying and pasting'. In its bilateral/regional relations, the United States has scarcely modified its own template since its development for NAFTA in 1992-1994, and it has even exported this template to other countries in Latin America for use in their own agreements. However, this is not the case with the EU, which for reasons mentioned in the Introduction, has often modified its templates for strictly internal reasons related to the distribution of competences between the EC/EU and its Member States (see the next section for a more detailed explanation).

In contrast, after the conclusion of FTAs with NAFTA countries (Canada, Mexico, and United States), Chile has more or less closely followed the NAFTA template in FTAs with third countries, notably in the recently agreed TPP and in the Pacific Alliance. One might ask why Chile would be ready to accept an ever-changing EU model of agreement, while it has already concluded deeper and more comprehensive agreements with developed and developing partners.

In sum, if the possibility of updating the existing AA is discarded, there should be a clear rationale for it. Those in the EU more interested in a deep and broad modernisation would apply the same arguments used for Mexico in the sense that 'much more is needed' (and that a parallelism with Mexico should be achieved).

c) **Another cluster of important issues relates to the legal nature of the new agreement,** or its 'mixity'. In the economic area, i) will the new agreement cover only the areas falling under the EU's exclusive competence; ii) will the areas falling under the Member States' competence be considered 'residual' and retained as little as possible; or iii) will it ambitiously and offensively bring together the EU and its Member States to handle all relevant issues (i.e. issues relevant for EU and Chile's citizens, businesses, civil society, and governments) without regard to whether they fall under EU or Member State competence?

d) **Regarding investment promotion and protection**, the issue of the 'new model' of the agreement is also extremely relevant in the context of negotiations with Chile, as well as in that of the negotiations with Mexico (as discussed in our parallel paper); especially in an area such as this that will certainly be one of the more difficult to negotiate. The European Commission is proposing a 'new model' for the chapter on investment (which includes an investment court and several clarifications with respect to investment protection). However, this new chapter will be introduced into the 'older model' of the agreement (which does not contain a dedicated investment chapter and refers to the existing BITs negotiated in the 1990s). It could be argued

that it would be more promising to approach this revision from the other side: to develop a 'new model' of the **agreement** in which a 'new model' of the **investment chapter** could be conceived. For example, the issue of investor-to-state dispute settlement would remain where it belongs (be one in favour of or against the BITs already signed by Member States), and the real advantages of the investment treaties could be considered. These advantages include: real measures of investment promotion; procedures to apply in cases of expropriation with adequate compensation; and an enhanced, more effective and balanced mechanism of state-to-state dispute settlement concerning investments, including consultation by investors to their home governments (or to the European Commission in the case of the EU) before triggering an international conflict with a third country. These issues are of utmost importance, but are absent from Member States' BITs.

4 Relation to other relevant trade agreements or ongoing negotiations

The reasoning in the last sub-section leads to deepen the discussion concerning the relation of the modernisation of the EU-Chile AA with other relevant trade agreements or ongoing negotiations. This is the object of this fifth section.

This section is divided in two parts. The first part is written from the EU perspective. It analyses the evolution of the EU's bilateral trade agreements with the objective of offering an overall background view for the policy discussion on what could or should be the reference or model for the modernisation of the trade pillar of the EU-Chile AA. The second part is written from the Chilean perspective and provides a comparative examination of the agreements and negotiations that could be considered more relevant by Chile.

This section was developed by the authors in the framework of their study on Mexico and its content is very novel in academic and consultancy literature. As it is essential, in the authors' opinion, from a policy perspective, and constitutes the basis for one of the study's main recommendations and conclusions, it is better to reproduce it almost in its entirety, with only a few minor adaptations to retain the autonomy of this report, rather than to summarise or reference the parallel study with Mexico. Furthermore, the arguments developed in it – mostly legal-institutional-political – apply even more to the modernisation of the agreement with Chile (a modernisation envisaged simply as a 'political goodwill measure' that will affect only very marginally the structure of international trade in the EU) than to that of the agreement with Mexico (for which more compelling economic reasons can be found).

However, as it was the case in the parallel study on Mexico, both parts of this section should be read under the 'long shadow' of the current Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the United States. If they succeed, as many people interviewed seem to think, and reach a deep agreement, there is a strong consensus in considering that any new EU-Chile agreement will most likely replicate its content. However, one might also consider the impact of the recently concluded TPP Agreement, where Chile (and also Mexico) has negotiated an agreement deepening existing commitments and undertaking new disciplines.

4.1 The view from the EU: are 'models' to be followed in the modernisation?

As mentioned before, the United States has a well-defined 'model' or template for its bilateral, regional, and preferential trade agreements: that of NAFTA, which has been expanded and updated following the normal evolution of the different disciplines contained in it.

This is not the case for the EU (nor for the EC previously). The absence of an 'EU model' certainly creates confusion not only at the international level, but more importantly at the internal level because economic operators and civil society at large (and even policymakers) do not understand the different natures, characteristics, and policy objectives of the international economic agreements concluded by the EU with different partners.

This diversity could have a very positive aspect if it responded to the different historical, economic, political, and geographic contexts in which the agreements are negotiated and signed. It would constitute a very healthy reaction to the approach that unfortunately prevails in international economic relations, according to which 'templates' acquire a life of their own and are applied to circumstances completely different from those for which these templates were first designed.

However, this is not the case for the EU. The evolution of its international bilateral and regional agreements responds largely to a strictly internal legal and institutional reason: the evolution in the distribution of competences between the EC / EU and its Member States:

(1) In the first period, when it was only the EC that promoted bilateral trade relations and all the other main global players in the capitalist world relied on GATT as the only international trade agreement, the main reference for the EC's bilateral international agreements was the EC Treaty itself, whose structure they somehow mirrored. Of course, the best example of this approach is the agreement establishing the EEA Agreement, negotiated in 1989-1991, signed in 1992, and entered into force in 1994. However, this approach still inspired later agreements, notably the European Agreements signed with countries in Central and Eastern Europe in the 1990s, and the Euro-Mediterranean agreements signed in the second half of the 1990s and the 2000s (even if the GATS 'pollution' (see the next two points) was already felt in the latter).

(2) NAFTA's signature in 1992 had no effect at the time on the EC's bilateral agreements. The main change came as a result of the inclusion of GATS within the package of WTO agreements issued from the Uruguay Round (entry into force in 1995). GATS created a completely new notion, 'trade in services', defined in a way that includes not only international exchanges of services but also FDI in the services sectors, nicknamed 'Commercial Presence' or 'Mode 3 of supply of services'. The European Commission used this invention to justify an extension of the EC's exclusive competence in Commercial Policy to 'trade in services' (in the GATS sense: i.e. including FDI in the services sectors). It succeeded in the Treaty of Nice (2001), which brought about this extension. This is why, in order to give life and political effect to this newly acquired EC competence, the chapter on services of the agreement with Chile signed in November 2002 is, essentially, taken from GATS (including the recourse to a 'positive list' of specific commitments).

(3) The negotiations of the EU 'Constitutional' Treaty opened a new period that was finalised when its economic provisions entered into force as part of the Lisbon Treaty in 2009. As they redefine the scope of the EU's Commercial Policy, extending it explicitly to FDI, there is no longer a need for this discipline to enter EC agreements through the back door (as 'trade in services'). Now, it can enter explicitly through the main door. Therefore, the Chilean/GATS-like model is abandoned. The best examples of this approach are the EU agreements with Korea, Central America, and Singapore.

(4) However, this leaves the discussion open on how the EU will deal with all other forms of investment beyond FDI. An evolution is clearly perceptible, from the agreements with Korea, Central America, and Singapore to the agreement with Canada. In the EC Treaties, and opposite NAFTA, there is not a unified chapter dealing with 'investment' (a notion alien to EU law), but rather two different chapters, one dealing with establishment (which would be the EU law equivalent to FDI) and the other with movements of capital, which includes other forms of investment.[136] A trace of this distinction can still be found in the agreements with Korea, Central America, and Singapore, as they deal with establishment in one chapter (together with services) and include a separate chapter on either movements of capital (Korea and Central America) or

[136] This question, extremely relevant, is rarely discussed in academic literature (see Xavier Fernandez-Pons and Ramon Torrent, 'The (Unnoticed?) Contradictory Overlapping of International and Domestic Rules on FDI: Getting the Legal Facts Right. Society of International Economic Law (SIEL), 3rd Biennial Global Conference, Singapore July 2012' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2091211 <http://papers.ssrn.com/abstract=2091211> accessed 3 February 2016). See also Annex I of the companion study on the update of the Global Agreement between the EU and Mexico. But this question has been present in EU institutions at least since 1996 when it was passionately discussed between the Council and the Commission's Legal Services.

investment protection (Singapore). This is also the case with the AA with Ukraine (signed in June 2004), which is similar in this regard to the AA signed with Korea and Central America, and which should also be examined carefully as a precedent for a new agreement with Chile. However, this distinction nearly disappears in the agreement with Canada (CETA), which instead conforms to the NAFTA model of a single chapter on investments, following the standard NAFTA content. A tribute to the former 'love' for GATS is evidenced by effectively incorporating Article XVI of GATS into Article X.4 of CETA.

Therefore, the 'NAFTA-isation' of EU international agreements has replaced a previous 'WTO/GATS-isation'[137] and has completely buried the initial approach of trying to mirror the approach of the EC Treaty in these international agreements. This consideration is extremely relevant for the discussion about which should be the reference for the modernisation of the AA with Chile. Furthermore, it is evident that, concerning Mexico, if the political goal is to ambitiously deepen and broaden the Trade Pillar of its Global Agreement without simply more or less copying NAFTA or NAFTA-like agreements (including the TPP or CETA), the precedent of the old AAs must be introduced into the discussion. Then, concerning Chile, does it make sense to modernise the existing agreement simply in order to replace the WTO/GATS-isation with the NAFTA-isation? The authors' answer is negative.

The old AAs concluded by the EC and its Member States have two great advantages for the EU that can be maintained, even if their scope and coverage were reduced in the case of an update or a new agreement with Chile.

(1) The first is that, in its structure and thematic coverage, the old AAs mirror the EC Treaty (this is very different from NAFTA and its likes and from the WTO agreements). They follow, thus, a specific 'EC/EU approach' to international economic relations (IER) and regional integration (RI).

(2) The second is that they approach IER and RI as dynamic processes that, while having strong foundations in their primary law, require continuous law-creation and law-adaptation.[138] For this purpose, these agreements include an effective mechanism of law-creation that, in some cases, has led to extremely interesting developments in areas of utmost importance for 'regulatory convergence'. This is the case, for example, of the Joint Council decisions on the regulation of competition in the framework of the Europe Agreements. Therefore, the old EU AA approach builds on what must undoubtedly be considered one of the greatest and best contributions of European integration to the architecture of international economic integration: its wise and well-balanced articulation of primary and secondary law.[139]

These two great advantages are interlinked, as experience proves that the only way of really tackling the issue of 'regulatory convergence', seemingly one of the main alleged objectives of CETA, TPP, and TTIP (and certainly the one in which the EU is the absolute world leader), is by the enactment of secondary law.

[137] These two barbarisms seem to the authors the best way to emphasise such a highly significant development as that of the loss of the specific 'EC' approach and the importation of approaches completely alien to the logic of European integration.

[138] See also concerning 'Dynamism and capacity of adaptation', as one of the four dimensions of regional integration, Ramon Torrent, 'Regional Integration Instruments and Dimensions: An Analytical Framework' in Robert Devlin, Antoni Estevadeordal, and Inter-American Development Bank (eds), *Bridges for development: policies and institutions for trade and integration* (Inter-American Development Bank: Distributed by the Johns Hopkins University Press 2003).

[139] Articulation and good balance that were broken by the Maastricht Treaty in the new provisions it introduced in the EC Treaty. See Ramón Torrent Macau, '¿Cómo Gobernar Aquello Que Se Desconoce?: El Caso de La Comunidad Europea En Tanto Que Unión Económica Y Monetaria' (2005) 9 Revista de Derecho Comunitario Europeo 47; and Ramón Torrent, '¿Cómo Se Engendró En Los Años 1980 La Crisis Del Proceso de Integración Europea Que Ha Estallado En Los Años 2000?' (2007) 37 Cuadernos europeos de Deusto 145.

Other alternative approaches do not necessarily produce the same level of convergence. The promotion of voluntary standards accepted by private firms would be limited and practicable only in some sectors. The creation of committees and subcommittees that discuss and study harmonisation or standardisation in practice does not always have much practical effect. A final choice would be adopting an approach in which regulation is progressively abolished, if it is viewed simply as creating indirect barriers to trade.

Therefore, it is of utmost importance whether any new agreement with Chile will provide for the main element required to put into practice that approach: a Joint Council able to take decisions in order to progressively create secondary law.[140]

4.2 The view from Chile: comparative examination of other relevant agreements and negotiations

As previously mentioned, Chile has an extensive experience in the negotiation an update of trade and investment agreements. This circumstance will undoubtedly inform the position of Chilean negotiators in several areas, including those discussed in this study as important to consider for update of the AA with EU, like government procurement, investment, regulatory convergence and sustainable development.

(1) Government procurement

Without considering the partial scope agreements (PSAs) concluded by Chile under the Latin American Integration Association (ALADI), Chilean FTAs have provisions regulating public procurement closer to CETA. The exception to this is the Chile-Peru FTA; although, the Additional Protocol signed in 2014 between both countries together with Mexico and Colombia in the framework of the Pacific Alliance includes a detailed chapter on public procurement (Chapter 8).

Further, public procurement provisions in Chilean FTAs follow a similar structure: they include the principles of national treatment and non-discrimination, rules of origin, denial of benefits, tendering procedures, special provisions for government procurement for small businesses, and lists of entities (federal, state, and provincial government enterprises) covered by the agreement. Only the Mexico-Chile FTA includes a provision allowing the parties to have recourse to the dispute settlement mechanism of the agreement in alleged cases of nullification or impairment related to government procurement regulated in the chapter (Articles 15bis-27).

(2) Investment

It is noteworthy that although Chile has a large number of BITs in force, without considering the renegotiation of the BIT with Uruguay in 2010, Chile has not negotiated a standalone BIT in more than 10 years (Chile's most recent BIT was signed with Iceland in 2003), opting instead to include investment disciplines in most of the PTAs it has signed.[141] The possible reason for this policy change might be that in Chile's view, investment chapters are generally more comprehensive than BITs, and commitments are made on all sectors of the economy (except for exceptions identified as non-conforming measures), with rules applicable to both investment in goods and services.[142] Investments directed towards sectors

[140] CETA also establishes a Joint Committee that has the power to take binding decisions. But it does not seem that, in practice, once the agreement will have entered into force, this Joint Committee will be comparable with the mechanisms set up by the AAs (including that with Ukraine) or by the Global Agreement with Mexico.

[141] WTO, Trade Policy Review Body, 'Trade Policy Review, Report by the Secretariat – Chile, WT/TPR/S/220' (2009) 19 <http://www.wto.org/english/tratop_e/tpr_e/tp320_e.htm> accessed 11 June 2014.

[142] For example, see the ratification process of PTAs before the Chilean Congress in Bulletins N° 6220-10 (Australia), N° 5128-10

related to services are particularly important for Chile, in the context of the formation of GVCs and the integration of economies.[143] This policy is very much in line with recent global developments; although, BITs are still the large part of the IIA universe.[144]

Today, Chile has nine PTAs with an investment chapter in force: with Canada (1996), Mexico (1998), South Korea (2003), the United States (2003), Colombia (2006), Peru (2006), Japan (2007), Australia (2008), and China (2012).[145] The Economic Cooperation Agreement (ECA) with Bolivia (1993) included a later BIT (1994) as new protocol of the agreement. FTAs with Central America, the EU, the European Free Trade Association (EFTA), MERCOSUR, and Panama do not include a special investment chapter, but they do refer to previous BITs signed by Chile with those parties (in the case of the EFTA, only with Switzerland, Norway, and Iceland).

The ECAs with Cuba, Ecuador, and Venezuela, the FTA with Malaysia, as well as the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP or P4 – concluded by Brunei, Chile, New Zealand, and Singapore in 2005) do not contain an investment chapter; however, there are separate BITs in force (in the case of the P4, only with New Zealand). The FTAs with Turkey and Vietnam do not include an investment chapter, and separate BITs are not yet in force. The PSA with India and the FTAs with Hong Kong (2012) and Thailand (2013) also do not include investment chapters, but there are no separate BITs either signed or under negotiation; although, both FTAs have provisions that allow for the negotiation of an investment chapter in the future.[146] In the PSA with India, negotiations to expand it are currently underway. [147]

In general, investment chapters in Chilean PTAs include disciplines on sector liberalisation (through negative lists); standards of treatment like national treatment, MFN, and international minimum standards; performance requirements; free transfers of capital; expropriation and compensation; and dispute settlement (including investor-state arbitration).[148]

In February 2014, Chile, together with the three additional countries that formed the Pacific Alliance in 2011 (Colombia, Mexico, and Peru) signed a protocol that includes a chapter on investment with substantive and procedural investment protection standards, similar those included in the investment chapters of previous Chilean PTAs.[149] This protocol has yet to be ratified.

The recently negotiated TPP includes a detailed investment chapter that aims to consolidate the level of liberalisation of foreign investment already existing in Chilean laws and treaties, and to improve the current standards of protection for foreign investors, striking an interesting balance between the protection of foreign investments and the sovereign right of states to regulate their interests in pursuit of

(Peru), N° 5000-10 (Colombia), N° 3318-10 (United States), N° 3279-10 (South Korea), N° 2257-10 (Mexico), and N° 2009-10 (Canada). República de Chile – Senado (n 57).

[143] Andrés Rebolledo, 'Entra En Vigencia La Alianza Del Pacífico' <http://www.direcon.gob.cl/2015/07/entra-en-vigencia-la-alianza-del-pacifico/> accessed 23 December 2015.

[144] UNCTAD (ed), *Reforming International Investment Governance* (United Nations 2015) 106-107.

[145] There is no investment chapter in the original text of the treaty. A supplementary agreement on investment between Chile and China was signed in September 2012 and is in force since February 2014, replacing a previous BIT between the two countries.

[146] Directorate General of International Economic Affairs (DIRECON), 'Acuerdos Concluidos Y En Negociación' <http://www.direcon.gob.cl/acuerdos-concluidos-y-en-negociacion/> accessed 26 June 2014.

[147] Directorate General of International Economic Affairs (DIRECON), 'Partial Scope Agreement Chile-India' <http://www.direcon.gob.cl/detalle-de-acuerdos/?idacuerdo=6235> accessed 3 July 2014.

[148] World Trade Organization (WTO), Trade Policy Review Body (n 152) 19.

[149] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014. Investing in SDGs: An Action Plan* (United Nations 2014) 115 <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> accessed 26 June 2014.

legitimate public policy objectives. [150] Overall, the TPP investment chapter is very similar to what Chile has concluded in other FTAs.

Regarding investment, Chile will follow very closely the recently concluded EU-Vietnam FTA,[151] the 'scrubbed' CETA investment chapter (which is effectively a renegotiation of the text), as well as developments in the TTIP framework (in particular, the European Commission proposal of a standing investment court for investor-state disputes).[152] In both the EU-Vietnam FTA and the revised CETA text, there is a broad consideration of the 'right to regulate', including even the deletion of the word 'necessary' from the phrase 'necessary to achieve legitimate policy objectives'. Most importantly, both treaties are the first concrete case of inclusion of the abovementioned EU proposal for a standing court system to settle investor-state disputes. However, certain minor differences can be detected across the treaties, as the court in the EU-Vietnam FTA comprises nine members (instead of 15 as in CETA and in the TTIP proposal). Working procedures are slightly more detailed in the EU-Vietnam FTA, stipulating that where consensus cannot be reached in Vietnam, majority is sufficient.[153] Other important differences include a strict rule stating that arbitral tribunals shall be bound by the interpretations of domestic law given by competent courts and authorities (rather than 'the tribunal shall follow the prevailing interpretation' in CETA and in the TTIP proposal).

(3) Regulatory convergence

a) Regulatory improvement in the Pacific Alliance

On 3 July 2015, the member countries of the Pacific Alliance signed a protocol amending the First Additional Protocol to the Framework Agreement of the Pacific Alliance, which includes in its Annex 4 a new Chapter 15a on 'regulatory improvement'. In this chapter, it is envisaged that regulatory improvement is achieved for the members of the Pacific Alliance through the establishment and systematic implementation of tools such as transparency and public consultation, review and *ex ante* and *ex post* measurement of the impact of regulations, and the simplification of procedures and services. [154]

The origin of this chapter is rooted in the Fifteenth Meeting of the High Level Group (HLG) of the Pacific Alliance, held in May 2013 in Santiago de Chile, where the HLG instructed the formation of a technical group with the mandate to negotiate a chapter on regulatory improvement from June 2013. As an initial goal, it was established that this chapter would reflect similar commitments agreed at that time by the members of the Pacific Alliance in other processes of trade integration of which they are part. Although the idea was that this negotiating chapter would end in 2014[155] and not be a part of the Additional Protocol to the Pacific Alliance, negotiations were extended until mid-2015 and the chapter was ultimately a modification of the First Additional Protocol. According to reports from the Pacific Alliance, the text is based on the OECD Recommendations of Good Regulatory Practices (2012) and the Asia-Pacific Economic Cooperation (APEC)-OECD checklist on regulatory reform. [156]

[150] Directorate General of International Economic Affairs (DIRECON), 'Acuerdo Transpacífico TPP – Inversiones' <http://www.direcon.gob.cl/tpp/capitulo-inversiones/> accessed 23 December 2015.
[151] European Commission – Directorate General for Trade, 'EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016' (n 72).
[152] European Commission, 'Transatlantic Trade and Investment Partnership. Trade in Services, Investment and E-Commerce. Chapter II – Investment' (12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 5 February 2016.
[153] EU-Vietnam FTA, Art. 12(10).
[154] Alianza del Pacífico, 'Temas de Trabajo' (*Alianza del Pacífico*, 8 February 2016) <https://alianzapacifico.net/temas-de-trabajo/> accessed 8 February 2016.
[155] The Declaration of Presidents of Cartagena de Indias, February 10, 2014, mandated the conclusion of a chapter on regulatory reform within the Alliance for the second half of 2014.
[156] First Amending Protocol to the Additional Protocol to the Framework Agreement of the Pacific Alliance

The new Pacific Alliance chapter considers internal and external mechanisms in order to improve regulation and economic competition and establishes measures to improve the business environment. 'Regulatory improvement' is then defined as 'the use of international best regulatory practices in the planning, preparation, adoption, implementation, and review of regulatory measures to facilitate the achievement of objectives of national public policy, and the efforts of governments to improve regulatory cooperation in order to achieve these objectives and to promote international trade, investment, economic growth, and employment'.[157]

However, not every governmental measure is considered a regulation. Regulatory measures are understood as those of general application regarding any matter covered by the Additional Protocol adopted by the regulatory authorities and with which compliance is mandatory. In addition, they must be 'covered' regulatory measures, which means that each Party shall, no later than three years after the entry into force of the amendment to the First Protocol of the Pacific Alliance, identify and make available to the public the 'covered' regulatory measures to which the provisions of the new chapter would apply, in accordance with its laws. In that determination, each Party shall consider achieving significant coverage.[158] Another important restriction is that the chapter on regulatory improvement is not subject to the dispute settlement provisions of the Additional Protocol, so its non-compliance is not directly enforceable by the Member States. In the same line, it also stipulated that in the event of any inconsistency between the regulatory improvement chapter and other chapters of the Additional Protocol of the Pacific Alliance, the latter should prevail. [159]

Although a level of convergence between Pacific Alliance members is desired, the chapter on regulatory improvement affirms the importance of the sovereign right of each Party to establish regulations as it deems appropriate, and to identify its regulatory priorities and establish and implement regulatory reform measures that take into account these priorities in the fields and levels of government that the Party deems appropriate. [160]

According to this new legal framework, the Pacific Alliance has envisaged both internal and external mechanisms of regulatory convergence. Internal mechanisms include commitments on good regulatory practices and a process of coordination and review. External mechanisms include, like in CETA, the creation of a Regulatory Improvement Committee,[161] regulatory cooperation activities, and implementation mechanisms, mainly through reporting and the review of the implementation reports.[162]

b) Regulatory improvement in the TPP

On 5 October 2015, after more than five years of negotiations, the 12 negotiating countries of the TPP Agreement, including Chile and Mexico, announced an agreement (the Citizens Trade Campaign had previously leaked various texts of this agreement on the Internet).[163] The official text was made available after its recent signing in New Zealand on 4 February 2016.[164]

The stated regulatory convergence goals of the TPP negotiations differ from what can be found in previous PTAs, taking a bolder step to eliminate unnecessary regulatory barriers and making the

https://alianzapacifico.net/?wpdmdl=4580> accessed 8 February 2016.

[157] First Amending Protocol to the Framework Agreement of the Pacific Alliance, Art. 15bis2.1.

[158] First Amending Protocol to the Framework Agreement of the Pacific Alliance Art. 15bis3.

[159] First Amending Protocol to the Framework Agreement of the Pacific Alliance Art. 15bis10.

[160] ibid.

[161] First Amending Protocol to the Framework Agreement of the Pacific Alliance Art. 15bis6.

[162] First Amending Protocol to the Framework Agreement of the Pacific Alliance Art. 15bis9.

[163] Citizens Trade Campaign, 'Trans-Pacific Partnership (TPP). Regulatory Coherence' (4 March 2010) <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf> accessed 24 June 2015.

[164] United States Trade Representative, 'TPP Full Text' (December 2015) <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> accessed 5 February 2016.

regulatory systems of member countries more compatible and transparent.[165] The regulatory coherence chapter in the TPP purportedly includes mechanisms to achieve greater domestic coordination of regulations, increase transparency and stakeholder engagement, and improve competitiveness and the ability of small and medium businesses to engage in international trade.[166]

The main declared objective of regulatory coherence is the harmonisation or, alternatively, the mutual recognition of regulatory measures that exert a major influence on international trade.[167] However, the TPP has a broader scope and includes procedural rules on transparency (public notice and prior consultation for new regulations); the elimination of duplicative and overlapping regulations; rules against anticompetitive practices, particularly for government monopolies and state-owned enterprises; greater use of mutual-recognition agreements for services and health and safety regulation; and clear lines of administrative and judicial appeal.[168] In fact, in the TPP chapter on regulatory coherence, there appears to be a predominant emphasis on convergence in procedural requirements rather than on convergence on the substantive content of the regulations.

The TPP chapter on regulatory coherence starts with a general provisions section that includes several statements regarding the importance of regulation and regulatory processes. Significantly, the chapter appears alert to the looming difficulty of agreeing on the general scope of regulatory coherence. Nevertheless, Articles 25.1 and 25.3 of the chapter confirm that the obligation of regulatory coherence is limited to certain regulatory measures ('covered regulatory measures') as defined by each country. Each Party shall promptly, and no later than one year after the date of entry into force of the TPP, determine and make publicly available the scope of its covered regulatory measures. In determining the scope of covered regulatory measures, each Party should aim to achieve significant coverage

The OECD and APEC did not consider it necessary to specify limits on the measures covered, which is consistent with the voluntary nature of their regulatory proposals. Under the regulatory coherence chapter of the TPP, a Party could choose to exclude certain rules from the coordination mechanism, in recognition of the fact that such a mechanism forms an integral part of a set of treaty obligations rather than a non-binding set of policy recommendations. For some, the TPP proposal significantly transforms the voluntary character of the existing OECD/APEC 'best practices' documents into an apparently enforceable obligation to establish regulatory processes and mechanisms. This change is not readily obvious, as the text uses hortatory language.[169]

Nonetheless, as in the APEC-OECD Checklist, this chapter of the TPP allow countries to choose between establishing mechanisms, processes, or a central body for coordination.

As previously agreed in the Pacific Alliance, the TPP has envisaged both internal and external mechanisms of regulatory convergence. Internal mechanisms include the encouragement of regulatory impact assessments (RIAs),[170] and provisions on the transparency and participation of stakeholders.[171] External mechanisms include, as in CETA and the Pacific Alliance, a Committee on Regulatory Coherence,

[165] Ian F. Fergusson and Bruce Vaughn, 'The Trans-Pacific Partnership Agreement' (2011) Congressional Research Service 8 <https://www.fas.org/sgp/crs/row/R40502.pdf> accessed 24 June 2015.
[166] Thomas Bollyky, 'Regulatory Coherence in the TPP Talks' in C. L. Lim, Deborah Kay Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012) 171.
[167] Claude Barfield, 'The TPP: A Model for 21st Century Trade Agreements?' (*East Asia Forum*, 25 July 2011) <http://www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/> accessed 24 June 2015.
[168] ibid.
[169] Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence* (23 October 2011) Citizens Trade Campaign <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf> 5.
[170] TPP, Art. 25.1.
[171] TPP, Art. 25.5.5.

consisting of representatives of the governments of the Parties. In addition, each Party shall designate and notify a point of contact to provide information at the request of another Party.[172]

(4) Sustainable development and other related issues[173]

Provisions with sustainable development policy objectives are increasingly considered in PTAs and IIAs, particularly with respect to environmental and labour issues. Some studies have highlighted a trend among South-South PTAs to gradually include labour provisions.[174] In the same line, other studies have reported[175] that language referring to environmental issues is rare in BITs, but is becoming increasingly common in other IIAs, both in North-South and South-South agreements.

However, almost none of the 53 Chilean BITs has explicit labour or environmental provisions[176] and only some of the investment chapters in Chilean PTAs tackle these issues.[177] Overall, 14 of the 23 PTAs address sustainable development issues, including provisions on labour and the environment.[178]

With respect to PTAs, there is a significant degree of variation in the way sustainable development provisions are considered, as some agreements contain detailed commitments in this regard, including the creation of joint commissions, cooperation procedures, and even citizen claims, while others merely refer to labour and environmental concerns in the preamble of the treaty. This inconsistency is common to treaties signed by Chile both with developed and developing countries, although two of the most detailed PTAs with respect to sustainable development are the FTAs with Canada and the United States.

a) Chilean PTAs with developed countries

The very first Chilean FTA was signed with Canada in 1996 and it included sustainable development and environmental protection as general objectives in the preamble of the treaty, and side agreements on labour and environmental cooperation. In labour matters, the agreement aims for a high level of national laws in the area of core labour standards (CLS), as well as minimum working conditions (hours of work, minimum wages, and occupational safety and health) and migrant rights, and the enforcement of national laws in these areas.[179] The environmental agreement has as one of its objectives the promotion of sustainable development based on cooperation and mutually supportive environmental and

[172] TPP, Art. 25.6

[173] This section draws heavily from Polanco (n 32).

[174] Franz Christian Ebert and Anne Posthuma, 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives' 19-20 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf> accessed 8 July 2014.

[175] For an overview of environmental provisions in investment agreements, see Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) <https://www1.oecd.org/daf/internationalinvestment/investmentpolicy/48083618.pdf> accessed 21 January 2014.

[176] The sole exception is the 2010 Chile-Uruguay BIT, which has a provision (Art. 14) declaring that a Party is not prevented from adopting, maintaining, or enforcing any measure compatible with that agreement that it considers appropriate to ensure that investment activity in its territory is undertaken considering host state's environmental powers. The lack of labour or environmental provisions is not an exclusive characteristic of Chilean BITs. As Cordonnier and Newcombe point out, with regard to sustainable development, 'stand alone IIAs have not yet begun to provide institutional mechanisms or capacity-building'. Marie-Claire Cordonier Segger and Andrew Newcombe, 'An Integrated Agenda for Sustainable Development in International Investment Law' in Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Paul Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 120.

[177] These are the investment chapters of the PTAs with Canada, the United States, Colombia, Peru, Japan, and Australia and in the Supplementary Agreement on Investment with China.

[178] These are the agreements with Canada, the United States, the P4, Australia, the EU, the EFTA, Japan, Colombia, China, Mexico, South Korea, Turkey, Malaysia, and Peru. DIRECON has indicated that the Chile-Hong Kong FTA will include environmental provisions and an MOU on Labour Cooperation. Directorate General of International Economic Affairs (DIRECON), 'Acuerdos Concluidos Y En Negociación' (n 157).

[179] As an enforcement mechanism, the agreement considers fines up to US$10 million in case of the non-application of national labour law in the area of child labour, occupational safety and health, and minimum wages. Franz Christian Ebert and Anne Posthuma (n 193) 12.

economic policies.[180] Both agreements include the creation of joint commissions for environmental and labour cooperation, and mechanisms allowing citizen complaints similar to NAFTA's labour and environmental agreements.[181]

The FTA signed with the United States in 2003 also contains a labour and an environmental cooperation mechanism in Chapters 18 and 19, respectively.[182] The labour chapter outlines a cooperative agenda to promote worker's rights and an agreement that it is inappropriate to weaken or reduce domestic labour protections to encourage trade or investment, requiring effective enforcement of domestic labour laws.[183] The environmental chapter's main objective is to contribute to the Parties' efforts to ensure that trade and environmental policies are mutually supportive in accordance with the objective of sustainable development, highlighting the importance of MEAs in this regard.[184] However, it does not consider citizen submissions like in the side environmental agreement with Canada.[185] Complementing this framework, the investment chapter includes a commitment to not lower standards in order to attract investment.[186] A parallel Environmental Cooperation Agreement was signed in 2003, establishing a Joint Commission for Environmental Cooperation.[187]

The FTA with Hong Kong (2014) also includes an environmental chapter,[188] including commitments to have its environmental laws, regulations, policies, and practices in harmony with its international environmental commitments, to not lower environmental laws and regulations so as to encourage trade and investment, and to promote public awareness of its environmental laws, regulations, policies, and practices domestically. A Memorandum of Understanding (MOU) on Labour Cooperation alongside the FTA reaffirms the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), and establishes a framework of institutional cooperation.

Sustainable development and environmental protection are also considered as general objectives in the preamble of the P4 treaty. Commitments to not lower labour or environmental standards are also included in the P4 Environmental Cooperation Agreement and in the P4 MOU on Labour Cooperation. This MOU is particularly important with respect to Brunei Darussalam, as the parties affirm their

[180] Canada-Chile Agreement on Environmental Cooperation (CCAEC), Art. 1 (b).
[181] The CCAEC allows submissions from any NGO or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. If either National Secretariat finds the submission meets these criteria, it is forwarded to a Joint Submission Committee who establishes whether the submission merits requesting a response from the Party, and which can even recommend the preparation of a factual record on a submission where it considers it warranted. See CCAEC, Arts. 14-15. The Canada-Chile Agreement on Labour Cooperation (CCALC) allows complaints ('public communications') to be submitted to signatory countries by natural persons, an enterprise, or an organisation of employers or workers on labour law matters arising in the territory of the other Party. Each National Secretariat shall review such matters, as appropriate, in accordance with domestic procedures. The communications accepted or declined for review and their status is made publicly available. See CCALC, Art. 15.
[182] In the Chile-United States FTA, entire categories of social and environmental regulations have been reserved by the Parties (e.g. fisheries) with the objective to preserve regulatory flexibility and secure transparency for firms. Marie-Claire Cordonier Segger and Andrew Newcombe (n 195) 128.
[183] ibid 134.
[184] Chile-United States FTA, Arts. 19 and 19.9.
[185] However, dispute settlement of the FTA could be triggered if a Party considers that a measure of the other Party is inconsistent with the obligations of this Agreement or that the other Party has otherwise failed to carry out its obligations under this Agreement, or wherever a Party considers that a measure of the other Party causes nullification or impairment. See Chile-United States FTA, Arts. 22.1, 22.16. These disputes may ultimately lead to economic consequences for the Party in breach of the labour provisions, as the dispute settlement consider fines up to US$15 million, something that some see as an enforcement mechanism for environmental or labour obligations. See Franz Christian Ebert and Anne Posthuma (n 193) 9.
[186] Chile-United States FTA, Art. 10.12.
[187] The objectives of this agreement are 'to promote the conservation and protection of the environment, the prevention of pollution and the degradation of natural resources and ecosystems, and the rational use of natural resources in support of sustainable development'. Chile-United States Agreement on Environmental Cooperation, signed on 17 June 2003, Art. I.
[188] Chile-Hong Kong FTA, Ch. 14.

commitment to the principles of the ILO Principles and Rights, and at the time of the signature of the P4 (2005), Brunei was not yet a member of the ILO.[189]

The FTAs with Hong Kong and the P4 (with Brunei, New Zealand, and Singapore) do not allow citizen submissions, but they consider the designation of points of contact to facilitate communication in these matters and do consider a state-to-state consultation process.

In the same vein, the Chile-Japan Strategic Economic Partnership (SEP) mentions in the preamble that the Parties are convinced that 'economic development, social development, and environmental protection are interdependent and mutually reinforcing pillars of sustainable development, and that the strategic economic partnership can play an important role in promoting sustainable development'. Only one provision of its main text recognises that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures.[190] However, in Annex 3 of a joint statement signed together with the SEP, both governments also declare that it is inappropriate to set or use environmental laws, regulations, policies, and practices for the purposes of disguised restriction on international trade. In the same annex, both countries reaffirm their intention to continue to pursue a high level of environmental protection and to fulfil their respective countries' commitments under applicable international environmental agreements, harmonising environmental laws, regulations, policies, and practices with those commitments, and promoting its public awareness. [191] With respect to labour commitments, in the same Annex 3, both governments reaffirm their respective countries' obligations as members of the ILO and their commitment to the abovementioned ILO Principles and Rights, sharing the view on the importance of having their respective countries' labour laws, regulations, policies, and practices in harmony with their countries' commitments under international labour agreements and the importance of promoting its public awareness. Both governments consider it inappropriate to set or use labour laws, regulations, policies, and practices for the purposes of disguised restriction on international trade and that it is inappropriate to weaken, reduce, or fail to enforce or administer the protections afforded in domestic labour laws solely to encourage trade or investment.

Similarly to the EU-Chile AA, the Australia-Chile FTA includes labour and environmental issues only as areas of cooperation. In labour and employment matters, cooperative activities will be based on the concept of decent work, including the principles embodied in the ILO Principles and Rights.[192] Cooperation on the environment is aimed at strengthening environmental protection and the promotion of sustainable development in the context of the reinforcement of trade and investment relations.[193] This treaty considers sustainable development and environmental protection as general objectives in its preamble.

The FTA with the EFTA has the lowest threshold on sustainable development issues, as it only mentions the promotion of 'environmental protection and conservation, and sustainable development', and the improvement of 'working conditions and living standards', as part of the preamble of the treaty.

[189] Brunei Darussalam became a member country of the ILO in January 2007, and it has only ratified two of the ILO's eight fundamental Conventions, the Worst Forms of Child Labour Convention, 1999 (No.182) and the Convention on the Minimum Age, 1973 (No.138). International Labour Organization (ILO), 'Brunei Darussalam' <http://ilo.org/asia/countries/brunei-darussalam/lang--en/index.htm> accessed 9 July 2014.
[190] Chile-Japan SEP, Art. 87 'Each Party recognises that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect, each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition, or expansion of investments in its area'.
[191] In the same Annex 3, both governments agree to encourage and facilitate, as appropriate, cooperative activities in the field of environment such as promotion of projects under the Clean Development Mechanism (CDM), and the exchange of information on environmental impact assessments of economic partnership agreements.
[192] Australia-Chile FTA, Art. 18.2.4.
[193] Australia-Chile FTA, Art. 18.2.5.

If the TPP is finally ratified, it will include one of the most comprehensive sets of commitments on the environment and labour found in a Chilean PTA. Regarding environmental issues, the agreement will require Parties to fulfil their obligations under MEAs, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Ozone Depleting Substances, and the International Convention for the Prevention of Pollution from Ships (MARPOL); prohibit or restrain fisheries subsidies, including those that contribute to overfishing; combat illegal fishing; promote sustainable fisheries management practices and protect wetlands and important natural areas.[194]

The TPP's labour chapter requires Parties to adopt and maintain in their laws and practices fundamental labour rights as recognised by the ILO, including the freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of employment discrimination. It also includes commitments to have laws governing minimum wages, hours of work, and occupational safety and health, and includes measures to prevent the degradation of labour protections in export processing zones.[195] The TPP also establishes specific institutional mechanisms to assist in its implementation (a labour council of senior governmental representatives).[196]

Most importantly, commitments in the environment and labour chapters are enforceable through the dispute settlement procedures and mechanisms available for disputes arising under other chapters of the TPP, including the availability of trade sanctions.

b) PTAs with developing countries

There is no fundamental change in the treatment of sustainable development issues if we review the Chilean PTAs with developing countries, as it also varies from detailed commitments to mere policy references, although fewer agreements with southern states include comprehensive obligations in this regard. The FTA signed with Colombia has a special chapter on the environment (Chapter 18), where the Parties reaffirm their sovereign rights over their natural resources, and the right to establish their own levels of environmental protection, promoting sustainable development and domestic policies and laws in harmony with international environmental agreements. In addition, the Parties recognise that it is inappropriate to use policies, laws, regulations, and environmental management as a disguised barrier to trade. A special provision is included in the investment chapter, declaring that a Party is not prevented from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[197]

In the same way, the FTA with Colombia includes a labour chapter (Chapter 17), where the Parties reaffirm their obligations as members of the ILO and their commitments under the ILO Principles and Rights, and recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour laws. In addition, the chapter details methods of cooperation between the Parties to achieve these objectives.

A similar approach is taken in the FTA with China (2007). Its preamble considers sustainable development and environmental protection as general objectives; it also contains supplementary MOUs on Environmental Cooperation and Labour and Social Security Cooperation. However, in the labour MOU with China, there is no explicit reference to ILO instruments; although, cooperation areas include decent work, labour laws and labour inspection, the improvement of working conditions and workers' training, globalisation and its impact on employment, the working environment, industrial relations, and

[194] See TPP, Ch. 20.
[195] See TPP, Ch. 19.
[196] TPP, Ch. 19.
[197] Chile-Colombia FTA, Art. 9.13.

governance.[198] We must recall that the ILO Principles and Rights in the FTA are included in the labour MOU with Hong Kong.

Cooperation issues in the environmental MOU with China include quality of water and air pollution.[199] In the Chile-China Supplementary Agreement on Investment (2012), it is explicitly recognised that non-discriminatory state measures, designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations except in exceptional circumstances.[200]

The FTAs with Mexico (1998) and South Korea (2003) do not include a supplementary agreement or a chapter on environment or labour. However, in the preamble of both treaties, sustainable development and environmental protection are considered as general objectives, and both treaties include a provision[201] that establishes that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns. In addition, it is recognised that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Consequently, a Party should not waive or derogate from such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment or an investor. If a Party considers that the other has offered such an encouragement, it may request state-to-state consultations with a view to avoiding any such encouragement.

In the FTAs with Turkey and Malaysia, the Parties recognise in the preamble the importance of strengthening their capacity to protect the environment and to promote sustainable development in concert with strengthening trade and investment relations between them. They also declare that it is inappropriate to set or use their environmental laws, regulations, policies, and practices for trade protectionist purposes. It is also inappropriate to relax or fail to enforce or administer their environmental laws and regulations to encourage trade and investment. In addition, both PTAs detail means of cooperation between the Parties to achieve these objectives.[202] Furthermore, the FTA with Turkey declares that both Parties will promote decent work and sound labour policies and practices, reaffirming their obligations as members of the ILO and their commitments under the ILO Principles and Rights, and recognising that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour laws.[203] The FTA with Thailand only includes provisions on cooperation in environmental and labour issues.[204]

The Chile-Peru FTA has a lower environmental threshold, only establishing that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[205] There are no obligations to not lower environmental standards and there are no state-to-state consultations on environmental matters. However, the same FTA has a labour MOU where the Parties reaffirm their obligations as members of the ILO and its commitments under the ILO Principles and Rights, and the UN International Convention on the

[198] MOU Labour Cooperation Chile-China, Art. 1.
[199] MOU Environmental Cooperation Chile-China, Art. 2.
[200] Chile-China FTA, Supplementary Agreement on Investment, Appendix A.
[201] Chile-Mexico FTA, Arts. 9-15, Chile-South Korea FTA, Art. 10.18. The same provision is found in the FTAs with Canada (Art. G-14).
[202] Chile-Turkey FTA, Art. 37.8, and Chile-Malaysia FTA, Art. 9.5.
[203] Chile-Turkey FTA, Art. 37.7.
[204] Chile-Thailand FTA, Arts. 11.5 and 11.6.
[205] Chile-Peru FTA, Art. 11.13.

Protection of the Rights of All Migrant Workers and Members of Their Families (1990).[206] The Pacific Alliance Protocol only includes sustainable development in the preamble and a provision to not lower environmental standards in the investment chapter.[207]

Neither the framework agreement with CA countries in 1999, nor the bilateral protocols with Costa Rica (1999), El Salvador (2000), Honduras (2008), Guatemala (2010), and Nicaragua (2012) include labour or environmental provisions. The same occurs with almost all the ECAs signed by Chile, with the exception of the ECA with Bolivia that includes a provision to promote cooperation in environmental preservation,[208] and the Chile-Ecuador ECA that considers in the preamble the creation of new employment opportunities and improving working conditions and living standards in their respective territories.

(5) Other areas where the level of ambition of the existing EU-Chile AA can be increased

For Chile, the TPP is an agreement that includes provisions on the regulation of intellectual property rights (including GIs), which can be an important model to consider when discussing the update of the AA in regards to wine GIs.

Under the TPP, GIs (defined as 'indications that identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin') are eligible for protection as trademarks.[209] This marks a departure from TRIPs (which deals with GIs separately from trademarks in Article 22) and from the overall EU treaty practice. TPP Chapter 18 also requires more stringent requirements with respect to the protection of new GIs, including provisions on transparency, due process, and even including the possibility of cancellation, as well as safeguards regarding the use of terms that are customary in the common language. However, existing GIs pursuant to an international agreement are effectively grandfathered.[210]

In the TPP, special provisions on wine certification and analysis are included, which basically eliminates these procedures as a general rule, and can be ordered only in cases of suspicion. For the Chilean wine business community, the EU should follow this trend and discontinue such procedures, even if they have been simplified with respect to Chile over the years (e.g. Chilean exporters now have access to a simplified VI-1 Certification,[211] but it should be further simplified as it also involves high costs).

The EU should examine this issue in the framework of the future competitiveness of its wine industry. It would be appropriate to analyse the impact of maintaining such rigid rules, and the impact of applying them with a criterion of reciprocity.

In contrast, the TPP marks the first time that a US FTA includes annexes on specific products. The TBT chapter includes an Annex 8-A on wines and distilled spirits that creates common definitions of 'wine' and 'distilled spirits' to facilitate trade in these products. At the same, the annex establishes parameters for the labelling and certification of wine products, while preserving the ability of regulators to ensure consumer protection.

[206] Chile-Peru FTA, Labour MOU, Art. 2.
[207] Pacific Alliance Protocol, Art. 10.31
[208] Bolivia-Chile ECA, Art. 19.g.
[209] TPP, Arts. 18.1 and 18.30.
[210] TPP, Arts. 18.31-18.36.
[211] European Union, 'V I 1 Document' (*Official Journal of the European Union*, 06 2008) <http://exporthelp.europa.eu/update/requirements/ehir_eu12_02v002/eu/auxi/eu_spwine_v1form.pdf> accessed 4 March 2016.

Therefore, the TPP considers coordinated approaches for wine and distilled spirits products, which include:

- Commitments to not reject imports solely because they use certain descriptive terms and adjectives related to wine or winemaking (like chateau, classic, clos, cream, crusted/crusting, fine, late bottled vintage, noble, reserve, ruby, special reserve, solera, superior, sur lie, tawny, vintage, and vintage character);
- A consistent declaration of label elements, including product name, country of origin, net content, alcohol content, use and placement of supplementary languages, and date markings;
- A commitment that no Party shall require a supplier to disclose an oenological practice on a wine label or container except to meet a legitimate human health or safety objective;
- The elimination for most certifications for wine on vintage, varietal, and regional claims, or for raw materials, and production processes for distilled spirits;
- A commitment to work towards greater mutual acceptance of each Party's oenological or winemaking practices; and
- The establishment of reasonable parameters for the sampling of wine and distilled spirits products when required.

4.3 Summary of the positions

In the negotiation of an update of the AA with Chile, the EU could be tempted to merely follow its most recent model of trade agreement, developed during the negotiations of CETA and the treaties with Vietnam, Singapore, and Korea, and the impending negotiation of the TTIP. In fact, the European Commission has explicitly stated that the modernisation of the AA with Chile should be compatible and comparable to CETA and TTIP.[212] Although there are several reasons that could lead the EU to consider the approach previously presented in this study, particularly the new developments in trade disciplines, the EU should also consider the positive aspects of the current AA with Chile before abandoning the existing framework between both countries.

On the other hand, the EU should consider that any update or renegotiation of the AA with Chile will also bring into play the extensive experience that Chile has in the negotiation of trade agreements, which can serve as the basis for a more autonomous negotiating position, beyond that of merely following EU templates, particularly in the specific issues described in this study: government procurement, investment, sustainable development, regulatory cooperation, and wines.

[212] European Commission and Directorate-General for Trade (n 128) 33.

5 Conclusions

This section addresses the questions explicitly formulated in the ToR based on the analysis conducted above. In view of the fact that, on the EU side, the modernisation of the agreement with Chile is viewed as an accessory to the modernisation of the 1997 EU-Mexico Global Agreement, the conclusions are closely related to those of the study for Mexico also developed by the authors for the EP.

5.1 Is there a real need for an update of the trade pillar of the EU-Chile Association Agreement?

The authors agree with the large consensus existing in both the EU and Chile on two considerations:

(1) As with the 1997 EU-Mexico Global Agreement, the 2002 AA between the EC and its Member States and Chile, together with the set of decisions taken in its framework,[213] has not worked poorly and has not given rise to any specific problems. Therefore, there is no 'need' to modify the agreement in the sense of 'fixing something that doesn't work'.

(2) The EU's decision to modernise its AA with Chile cannot be analysed separately from its decision to launch a similar process concerning Mexico. In fact, the latter provides the justification for both. Many of the reasons applicable to Mexico also apply to Chile:

- First, the global economy has changed, and there has been a shift in the geopolitical and geo-economic centres of gravity towards the Pacific;
- Second, the fading expectations for the WTO Doha Round; and
- Third, the perception of Chile as an increasingly important regional player in the Americas, and a country that is simultaneously Latin American, North American, and in the Pacific Rim. This is linked to the falling expectations concerning Brazil's internal evolution and international role.

However, it is quite evident that these reasons alone would not justify the time and effort required to undertake a modernisation that will have a negligible effect on the EU's economy and the structure of its foreign trade. The true reason seems to be, again, purely political: the EU does not want to leave a 'good friend' like Chile out of the new negotiations with other Latin American countries.

5.2 If such a need exists, in which areas and to what extent should the trade pillar of the EU-Chile Association Agreement be upgraded? What EU trade and investment agreement model should be the reference?

(1) Thematic coverage

The existing EU-Chile AA already has a broad thematic coverage. Therefore, the approach for the incoming negotiations seems to be that of completing it in specific aspects as well as, in all likelihood, adapting it to the new division of competences between the EU and its Member States after the entry into force of the Lisbon Treaty, mainly in the area of investment.

Concerning the narrowly defined trade aspects, some very specific demands from Chile may concern fisheries, and, as in the case of Mexico, a revision of EU rules of origin, allowing for accumulation of origin.

[213] See 'Chile-European Union' (*SICE – Foreign Trade Information System*, 15 January 2016) <http://www.sice.oas.org/TPD/CHL_EU/CHL_EU_e.asp> accessed 3 March 2016.

Specific demands on various aspects of services and investment in the services sector may also be raised (but may be countered by opposite demands from the EU). Chile may also raise issues stemming from its 'graduation' from a developing country and the negative consequences this may have had on the conditions of access to the EU market.

As in the case of Mexico, an area that can be highly contentious is that of investment and investment protection. For Chile, this is not an issue, as it feels perfectly comfortable with its BITs with most EU Member States.[214] From the EU perspective, this issue will come to the forefront, in particular, if a new agreement is negotiated, because the EU will certainly propose to depart from the GATS model embedded in the 2001 AA. In the GATS model, foreign direct investment in the services sector is treated as an element of 'trade in services'. To continue to follow this approach is illogical, as the Treaty of Lisbon has enlarged the scope of the EU's Commercial Policy in the area of FDI.

However, the EU must convince Chile (and its own Member States) that introducing a new chapter on investment, which modifies the BIT approach, is logical in the context of the new EU-Chile negotiations. The EU could claim that its new approach on investment protection (which has been included in the EU-Vietnam FTA and proposed by the European Commission for the TTIP negotiations and for the renegotiation of CETA) leaves more policy space to Chile, and better protects the country against unfounded ISDS claims. However, even in this context, if the EU wants to pursue with Chile the idea of an investment court (advanced in the TTIP negotiations, in the CETA 'scrubbed' text, and in the EU-Vietnam FTA), it will require some convincing for a country that, overall, does not have a negative perception of ISDS.

Finally, regulatory convergence has been mentioned as a privileged 'new topic' that should be addressed by the new arrangement. The implementation of wine GIs and the recognition of oenological practices can become contentious, even if the AA already covers these areas in a dedicated agreement.

(2) What type of EU agreement should be the reference?

This question is only relevant if the TTIP negotiations do not lead to the ambitious outcome some predict, fear, or wish. If the TTIP becomes a success, the authors share the unanimous view that, like the EU-Mexico negotiations, the EU-Chile negotiations will also mirror the TTIP's.

If TTIP negotiations continue to drag on or reach a very modest outcome, the question of the type of EU agreement that should/could be used as a reference or 'model' for EU-Chile negotiations remains wide open. This question, of a legal-institutional-political nature, is even more relevant for the modernisation of the agreement with Chile (a modernisation envisaged simply as a 'political goodwill measure' that will only marginally affect the structure of the EU's international trade) than for that of the agreement with Mexico (for which more compelling economic reasons can be found).

The authors insist on the need to broaden the analysis and not to limit the discussion to the more recent agreements, which are increasingly 'NAFTA-ised' and distant from the EU agreements more closely related to the EU 'spirit'. Copying and pasting recent EU agreements with only minor adjustments (probably CETA, because of geographical and time vicinity) would certainly be an all too easy negotiating recourse. However, it is doubtful that this method serves EU interests. Of course, it would make the negotiations very easy for Chile, which has made wide use of this approach in its bilateral agreements.

[214] Chile has been respondent State in only three investor-State arbitrations, and two have been based on the BIT with Spain: Victor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2) and Sociedad Anónima Eduardo Vieira v. Republic of Chile (ICSID Case No. ARB/04/7). The third case was based in the BIT with Malaysia (MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7)

This is why the authors consider that the search for the best model of reference should be enlarged to the 'old' AAs that had a distinctive 'EU flavour' in their thematic coverage and dynamic nature. If the agreement establishing the EEA seems too ambitious, the model of the Europe agreements seems to perfectly fit the conveniences of the negotiation. It should be underlined that, contrary to common belief, AAs have nothing to do with EU enlargement and accession negotiations. The most ambitious AA (the EEA) was conceived with the absolute opposite objective (i.e. to stop EFTA countries from entering the EC). Additionally, the Euro-Mediterranean AAs have never been thought of from the perspective of accession, and this has also been true with the Europe agreements, which do not mention future accessions (unthinkable when they were designed). The best proof of this notion is that when the road to accession was finally open, a completely new instrument had to be invented (Accession Partnerships), as the Europe agreements were useless in this regard.

Bearing in mind the already wide coverage of the existing AA, the option of not re-writing a new horizontal agreement, but rather completing it and modifying a few of its chapters should also seriously be considered. This option would be much more expeditious than embarking on journey to negotiate a new AA.

5.3 What are the main expectations and concerns on both EU and Chilean sides?

On both sides, in general, the expectations favour a very ambitious agreement, and the concerns are very low. There can be much more agreement between the EU and Chile than between the EU and Mexico on the relationship of the new agreement with existing and future legislation in the areas falling in its scope. As mentioned in the first part of this report, Chile has significant experience in the negotiation of bilateral agreements based on a very open trade policy that, furthermore, has the distinctive characteristic of the application of a flat tariff rate to all goods. On that basis, the Chilean approach has always been that of trying to gain access to foreign markets by 'giving in exchange' what they have already decided autonomously.

For the EU, the 'ambitiousness' of the agreement must not entail any modification of existing legislation besides the needed preferential modification of some import conditions (tariffs and tariff-rate quotas and possibly some rule of origin) and what has been agreed in the WTO framework on export subsidies. Therefore, both sides could concur on attempting to develop a future agreement that is fully compatible with existing domestic legislation.

5.4 What are the main obstacles (political and economic) the negotiations may face in the EU and Chile?

There are no serious identifiable political obstacles at this stage. As said, expectations are high on both sides. However, on the Chilean side, some of those interviewed for this report mentioned that the discussion and eventual Congressional approval of the TPP could ultimately affect the discussion of an update or renegotiation of the AA with the EU to the extent that positions more critical of PTAs are successful in capturing public opinion and in the parliamentary debate.

On the EU side, a very ambitious agreement will certainly face the usual legal and political problems arising from the distribution of competences between the EU and its Member States. These problems will affect the nature of the agreement and its 'mixity' (which is absolutely necessary if the agreement must be very ambitious), as well as its content and institutional arrangements (as some Chilean experts are

starting to discover, like their Mexican colleagues, that the division into three distinct pillars[215] tends to undermine the effectiveness of the agreement, as it insulates the trade pillar from the impulse it could receive from political dialogue).

On the Chilean side, the successful results achieved in the Pacific Alliance (with Chile, Colombia, and Peru, with its possible extension to other Latin American countries like Costa Rica and Panama), as well as in the TPP, can lessen the importance given to relations with the EU, which are already well framed within an AA that works well. Chile, which is probably one of the few countries with greater experience in the negotiation of bilateral agreements, could envisage the negotiations with the EU as simply 'yet another', thus minimising its importance. This should encourage the EU to find an approach built on its real assets (including its leading global position in the fields of regional integration and regulatory convergence) instead of trying to run behind initiatives and approaches launched and promoted by other world powers.

Economic obstacles are not clearly identifiable at this stage. Agendas remain in the hands of the officials on both sides, and the business communities have not yet defined their offensive and defensive interests.

5.5 How does the planned upgrade fit into the new 'trade for all' EU strategy of October 2015?

The impression obtained by the authors, both from their desk research and interviews, is that the EU strategy behind the negotiations is not what was designed in 'trade for all' in October 2015, but that of 'Global Europe: Competing in the world' from October 2006.

It was 'Global Europe' that legitimised the race to negotiate bilateral agreements with many countries around the world in order to 'open markets', favour exports, and through exports, favour growth (giving less importance to their possible adverse effects and the possible damage to the multilateral trading system). However, the Global Europe strategy, which focuses on countries with 'market potential (economic size and growth) and a high level of protection against EU export interests (tariffs and non-tariff barriers)', may apply to the negotiations with Mexico, but does not apply to Chile, which has a very small market that is already very open to EU exports. Once again, the incoming trade negotiations with Chile tend be viewed as an initiative with no identifiable trade strategy other than that of being an 'accessory' to the negotiations with Mexico.

If the planned upgrade includes issues like reinforcing regulatory cooperation, a new approach to investment protection beyond existing BITs and including and investment court system, and further promotion of sustainable development in the trade pillar, the modernised agreement will be very much in line with the new 'trade for all' strategy.

[215] We refer to the 'three pillars' of EU AAs, which have nothing to do with the so-called 'three pillars' structure of the EU after the Maastricht Treaty.

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